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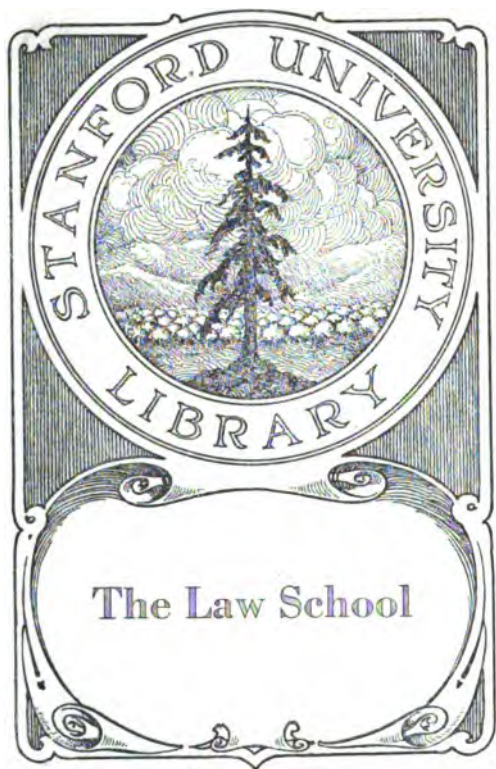
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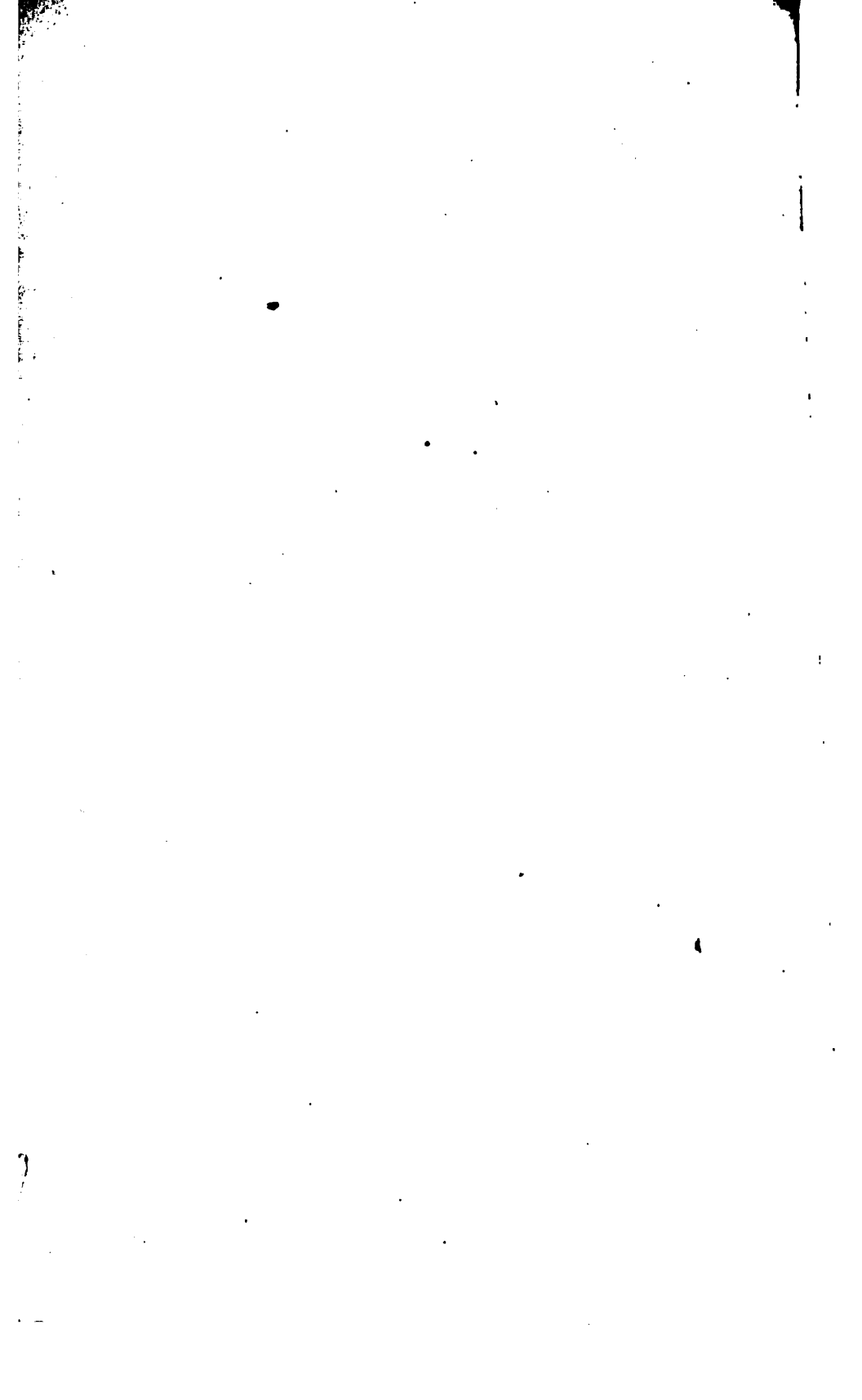
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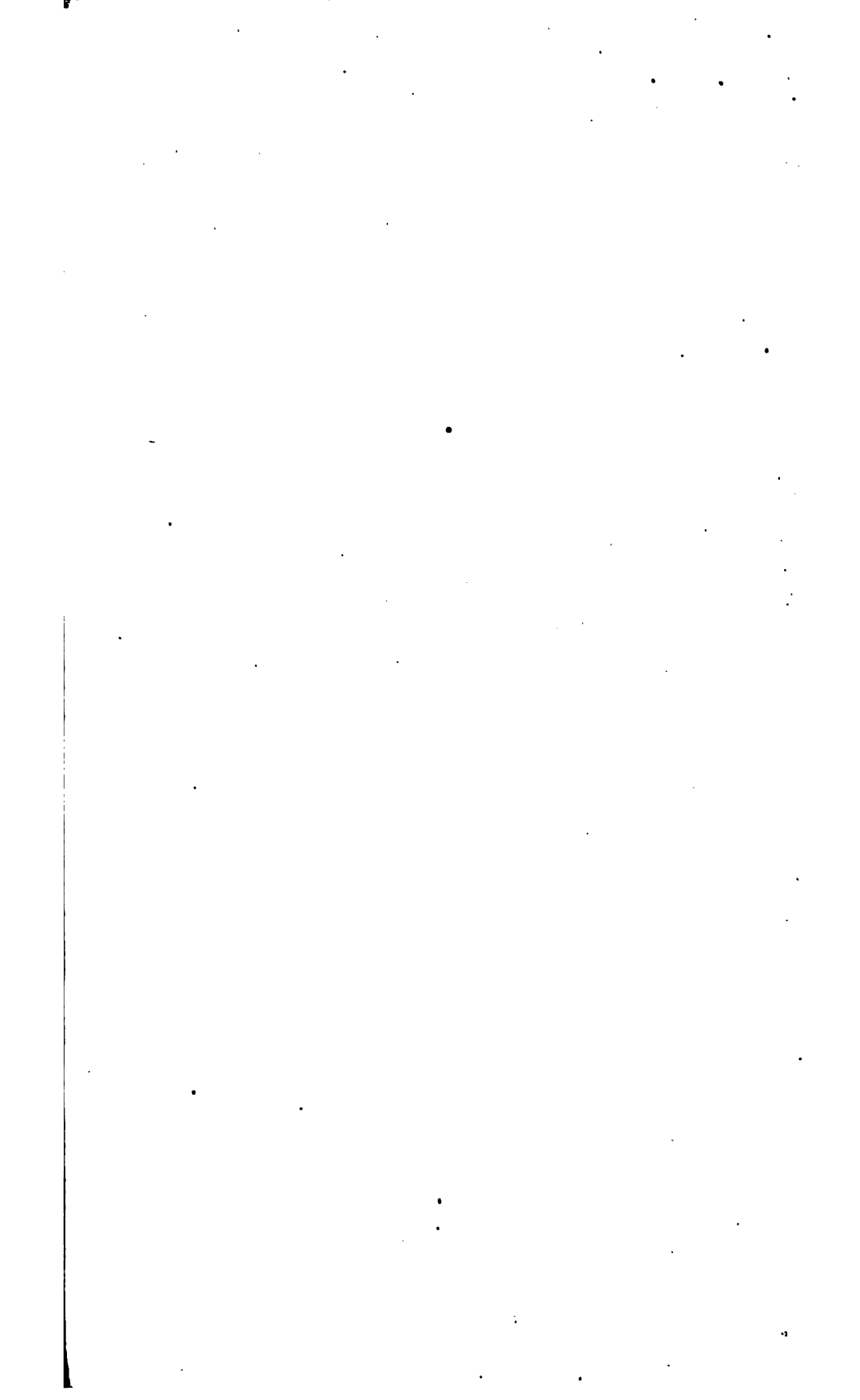
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REPORTS
OF
CASES DECIDED
BY THE
ENGLISH COURTS,
WITH
NOTES AND REFERENCES TO KINDRED CASES
AND AUTHORITIES.

BY
NATHANIEL C. MOAK,
Counsellor at Law.

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1 APPEAL CASES, pp. 611-706.
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¹ Died June 16, 1877 : 12 Law Jour., 372.

² Retired on account of ill health October, 1877 : 68 L. T., 417.

³ Appointed June, 1877, in place of Lord Justice MELLISH : 12 Law Jour., 386.

⁴ Appointed Nov., 1877, in place of Lord Justice AMPHLETT : 12 Law Jour., 631.

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BEFORE THE
HOUSE OF LORDS
AND THE
JUDICIAL COMMITTEE
AND
LORDS OF HER MAJESTY'S MOST HONORABLE
PRIVY COUNCIL.

[1 Appeal Cases, 611.]

H.L. (E.), June 30; July 3, 1876.

[HOUSE OF LORDS.]

***THE QUEEN, on the Prosecution of the PUBLIC [611
WORKS LOAN COMMISSIONERS, Appellant; and THE
CHURCH-WARDENS OF ALL SAINTS, WIGAN, and Others,
Respondents (')].**

*Mandamus—Public Works Loan Commissioners—Payment of Loan—Limitation of
Time—57 Geo. 3, c. 34—5 Geo. 4, c. 36—19 & 20 Vict. c. 104.*

A writ of mandamus is a prerogative writ, and not a writ of right, and the granting of it is, in that sense, discretionary. The exercise of this discretion cannot be questioned, but the grant of a peremptory mandamus is a decision upon a right, declaring what is and what is not lawful to be done, and such decision is subject to review.

The 5 Geo. 4, c. 36, s. 1, gives to church-wardens and overseers of parishes the power to borrow money from the Public Works Loan Commissioners for the purpose of building or repairing churches, &c., and gives the Commissioners the power to make loans to them for such purposes. It then confers on the church-wardens the power to make rates for the repayment of such loans, "by annual or half-yearly instalments within the period of twenty years, at farthest, from the advancing of any such sums respectively."

Held, that after the expiration of the twenty years the church-wardens and overseers had no power to make a rate for the purposes of paying money borrowed under the act, and that, consequently, a mandamus commanding them to do so could not be sustained.

(') Affirming L. R., 9 Q. B., 317.

1876

The Queen v. Church-wardens of All Saints, Wigan.

H.L. (E.)

The 15th section of 19 & 20 Vict. c. 104, does not affect this matter.

A power of that sort given in any particular act must be exercised in exact accordance with the authority given, and the restrictions imposed, by the act itself.

Per LORD HATHERLEY: The power given in the 5 Geo. 4, c. 36, s. 1, to the Public Works Loan Commissioners, to regulate the mode and proportions of a rate for the payment of a loan made by them (a power which must be exercised in a reasonable manner), would prevent the loss of the last instalment, though it might not become actually due until the end of the twenty years.

Per LORD CHANES: The Legislature having given ample authority and facilities for making the rates so as to secure payment of the loan within the time limited, has created an implication that it did not mean to allow the making of any rate after that time had passed.

This was a proceeding in error on an application for a mandamus to be issued to the church-wardens of Wigan 612] (and some other places united therewith, and formerly constituting the parish of Wigan), to make and collect a rate in order to discharge a debt due to the Public Works Loan Commissioners. The facts had been turned into a special case, which, so far as is material to the present appeal, set forth the following facts:

The prosecutors were the Commissioners appointed under the 57 Geo. 3, c. 34, "An act to authorize the Issue of Exchequer Bills and the Advance of Money out of the Consolidated Fund to a limited amount for the carrying on of Public Works and Fisheries in the United Kingdom." The parish of Wigan was formerly a very extensive parish, but several of the districts which then constituted it had, since, been duly formed into distinct parishes. The church-wardens and overseers of Wigan, and of the other parishes, were the persons against whom the application for a mandamus was made, and all had made returns to the writ.

By the 5 Geo. 4, c. 36, s. 1, reciting several acts, it was enacted that, "From and after the passing of this act it shall and may be lawful for the church-wardens, &c., of the poor in any parish in England or Wales, with the consent of the major part of the inhabitants and occupiers assessed to the relief of the poor, in vestry assembled, or where any parish shall be under the care and management of any select vestry, or other select body, then with the consent of not less than four-fifths of such select vestry or other select body, with the consent of the bishop of the diocese and the incumbent of such parish, to make application to the Commissioners," &c., under the acts therein recited, "for any loan or advance" under the powers of those acts, of "such sum as may be necessary for defraying the expense of rebuilding or repairing or extending the accommodation in any church or chapel of any such parish or district," &c., and the Commissioners were empowered to make

any such loan for the purposes aforesaid, under the authority of that act and the recited acts, and the overseers, &c., were empowered to receive the same and to apply the same for the purposes mentioned in the application, and, after the grant of such loan, "it shall be lawful for the church-wardens or chapel-wardens, and the overseers of the poor in respect of which such loan shall be advanced as aforesaid, and their successors, from time to time, for the time being, and they are **hereby authorized and re-* [613 *quired* to make such annual or half-yearly rates, for the repayment of the sums so advanced, in such proportions and at such times as shall be directed and appointed by the said Commissioners in that behalf, and to assign the rates so to be made as aforesaid as a security for the repayment of the sums so advanced in such manner and form as the said Commissioners shall direct and appoint, and so as to secure the payment of all sums so advanced, with interest thereon at and after the rate of 4 per cent. per annum, by annual or half-yearly instalments on the amount of the principal money advanced, within the period of twenty years at farthest from the advancing of any such sum respectively."

On the 10th of August, 1849, the church-wardens and overseers of Wigan duly made an application for a loan, which application was granted by the Commissioners to the extent of £4,540; and on the 17th of September, 1849, an indenture of assignment of the rates which should from time to time be made, to secure the payment of the loan with interest, was executed under the authority of, and with the forms required by, the statute. There was a proviso making the indenture void on the payment of £227 in each year, being the full amount of the principal. Four payments were made under this indenture, the last being upon the 17th of September, 1853, these payments amounting to the sum of £908, leaving the principal sum of £3,632 unpaid. At a vestry duly convened on the 13th of July, 1854, for the purpose of levying a church-rate, a portion of which was to be applied to the payment of the fifth instalment, the motion for levying a church-rate was refused, and no payment of any instalment had since been made. The Commissioners frequently demanded payment, but did not take any means to enforce it.

The 19 & 20 Vict. c. 104, made provision for the better spiritual care of populous parishes, by the constituting of new parishes, and the 15th section of that act provided that the incumbent of any new parish should have the same rights and powers as the incumbent of the old parish, and

then followed this proviso: that "nothing herein contained shall be taken to affect the legal liabilities of any parish [614] regulated by a local act of Parliament, *or the security for any loan of money legally borrowed under any act of Parliament or otherwise."

Some of the districts constituting the old parish of Wigan had, before 1849, and some others since 1849, been formed into distinct parishes under Orders in Council, and all had held their regular vestry meetings ever since.

On the 27th of December, 1866, notices were given by the Public Works Loan Commissioners to the church-wardens and overseers of each and all of the districts and townships formerly constituting the parish of All Saints, Wigan, requiring them to make rates to satisfy the sum still unpaid. They did not comply with the requisition. A mandamus to compel them to do so was therefore applied for, and, on the 11th of June, the Court of Queen's Bench, after hearing the case argued, gave judgment for the prosecutors, and ordered that a mandamus should issue for making a rate or rates for the payment of £4,841 15s. 10d. then due. Returns were made to this writ, which returns were demurred to, and the Court of Queen's Bench gave judgment on the demurrers, and ordered a peremptory writ of mandamus to issue. On appeal to the Exchequer Chamber, this judgment was, on the ground that more than twenty years had elapsed since the making of the loan, reversed⁽¹⁾. Against that reversal the present appeal was brought.

The *Attorney-General* (Sir J. Holker) and Mr. *Hugh Cowie*, for the appellants: The respondents are the successors of the church-wardens who applied for the loan, and for whose benefit the loan was made. They are, therefore, the debtors who are bound to pay. To them, by the very words of the statute, the power is given to make a rate, to assign it and to repay the loan, and they are bound to exercise the powers thus conferred on them. The division of the old parish into new parishes does not affect the question of liability, and the 19 & 20 Vict. c. 104, expressly continues the liability on any security for any loan of money borrowed under any act of Parliament. The provision as to payment [615] within twenty years is merely *directory, all that is meant is, that the church-wardens and overseers may, if they can, pay within twenty years by yearly or half-yearly payments, or at different times and in different proportions, but if they cannot, they are not released from all liability

⁽¹⁾ Law Rep., 9 Q. B., 317, where all the facts and the various acts are fully set forth.

to pay. That would be a gross injustice. There is nothing in the act to forbid them paying after that time. It is clear that the provisions of the act are merely directory, and cannot be construed literally, for, if so construed, there can be no rate applied for as to the last instalment until that instalment is actually due, which would be at the end of the twenty years, and then there would be no power in the church-wardens and overseers to make a rate to meet that last instalment. Here there is an express power to charge the rates by assignment, and that power cannot be affected by a provision which enables the church-wardens and overseers to pay within a specified time. It has been objected that a rate now made would be retrospective, but that is not a valid objection, for a retrospective rate is not necessarily illegal: *Harrison v. Stickney* (*). The Legislature may, expressly or impliedly, have authorized it (*). It is impliedly authorized here. There being an indefinite power to make rates to secure the payment of this loan, the exercise of that power in this case would not be illegal. In *Rex v. Carpenter* (*), where a delay of this sort took place, it was held that it did not extinguish the debt. The same rule was applied in *Reg. v. St. Michael's, Southampton* (*). [LORD O'HAGAN: But in that case there were no words of limitation as to time. Here they are expressly introduced.] There appears to be that distinction; but the words here are only directory. To the same effect is *Reg. v. Hurstbourne Tarrant* (*), and that case is exactly like the present, except that here the delay was a little greater. The extent of the delay was a matter for the exercise of the discretion of the Court of Queen's Bench, and that court has exercised its discretion and granted the mandamus. [LORD O'HAGAN: Can that be said to be matter for the exercise of discretion when the words used are prohibitory?] It is submitted that the words are not prohibitory, but are merely directory, *since the church-wardens and overseers are told how [616 and when they may make rates, but are not forbidden to make them in another form, and at other times, and in other proportions, should that be found to be more convenient. The interest is overdue; the indenture settled how that interest was to be paid, and in *Rex v. St. Michael's, Pembroke* (*) the court granted a mandamus to compel payment of overdue interest under circumstances such as exist here. The 4th and 5th sections of the statute, which apply to loans

(*) 2 H. L. C., 108.

(*) Ibid., per Baron Parke, at p. 125.

(*) 6 Ad. & El., 794.

(*) 6 El. & Bl., 807.

(*) El., Bl. & El., 246.

(*) 5 Ad. & El., 608.

to colleges, illustrate the argument, and assist the interpretation of the 1st, and they do not render the time mentioned absolutely restrictive.

The Court of Exchequer Chamber acted in this case without jurisdiction. All the cases show that the granting or refusing of a mandamus, which is a prerogative writ, is a matter within the discretion of the Queen's Bench. The discretion of the court upon a matter entirely within its discretion is not subject to be reviewed.

Mr. *Manisty*, Q.C., and Mr. *FitzAdam*, for the church-wardens and overseers of Wigan.

[Mr. *Lopes*, Q.C., and Mr. *Kenelm Digby*, and Mr. *John Edwards*, Q.C., and Mr. *Charles T. Part*, were for the other parties (parishes which had formerly been part of the parish of Wigan), but did not address the house.]

The matter before the court here was not a matter of fact, and therefore merely for the exercise of the discretion of the court, but was a question on the construction of a public statute—a matter of law—and was therefore subject to appeal.

The mandamus ought never to have issued, for it cannot be obeyed. The parish officers have now no power to make a rate. Their power to do so was limited to twenty years, and that time has gone by. Within the time specified in the act payment might have been enforced, it cannot be enforced now. In *Rex v. The Church-wardens of Dursley* (¹), a rate, to pay a loan for the repairs of a church, was held to be bad because such a rate ought to be raised at the time 617] when the repairs were done, for *that it was a general rule that rates ought not to be made retrospectively. The power of the Commissioners is gone.

Piggott v. Pearblock (²) decides that a power to borrow on the credit of the church-rate does not give authority to create retrospective rates; here the rate would be entirely retrospective, and would therefore be bad. The rule is strict, the rates must be made within the time specified by the act, and not afterwards. All that Mr. Baron Parke said in the case of *Harrison v. Stickney* (³) only amounted to this, that all rates existing under special acts of Parliament must be made in conformity with those acts, and, consequently, that some retrospective rates might, under the terms of those acts, be sustainable. That is precisely what the respondents say here, and this act having, for a particular purpose, given a power to make rates within twenty years—but only within twenty years—no rates can be made

(¹) 5 Ad. & El. 10.

(²) 4 Moo. P. C., 399.

(³) 2 H. L. C., 108, at p. 125.

after that time. It was the fault of the Commissioners to delay the enforcement of their rights, and the present church-wardens and overseers had no power to obey the mandamus, which, as it commanded an illegal and impossible thing, could not be sustained.

Mr. *Cowie* replied.

LORD CHELMSFORD : My Lords, the determination of the question upon this appeal depends entirely upon the powers of the Public Works Loan Commissioners and the obligations of the church-wardens of Wigan under the 5 Geo. 4, c. 36. These powers and obligations are clearly explained and limited by the 1st section of that act: [His Lordship read it, see *ante*, p. 612.]

It was argued for the Commissioners that these provisions are merely directory. It is difficult to understand in what sense this is meant, for nothing can be clearer to my mind than the imperative character of the act to prevent the Commissioners making a loan on any other terms than the one of securing the payment of it by annual or half-yearly instalments within the period of twenty years. It is said that the Commissioners might have directed the rates to be made in different proportions, and also at different *times in each years. It is true they might, but [618 that, certainly, would not have been so convenient as what they have done in fixing the annual payment at a certain amount, and in requiring in general terms yearly or half-yearly rates to be made. But it is useless to consider what might have been done; the question is whether the parties have acted in obedience to the act.

The church-wardens by the indenture of the 17th of September, 1849, assigned to the Commissioners the annual or other rates which should from time to time be made under or in pursuance of the direction and appointment of the Commissioners by virtue of the provisions of the 5 Geo. 4, c. 36, with a proviso making void the assignment on payment of the £4,540 borrowed, by annual instalments of £227, which would amount to that sum in twenty years. It was argued that by the terms of this proviso the Commissioners might accept, and the church-wardens might pay, the £4,540 in any other manner than by these annual instalments.

That proviso provides for the payment, first of all, of the interest on the amount borrowed, "and the farther sum of £227 in or towards the discharge of the said principal sum of £4,540, until the whole of the said principal sum of £5,540, and the interest thereof, shall be discharged, then

and in that case, or on any other acceptance of the said sum of £4,540 and the interest thereof, by or under the order or direction of the said Public Works Loan Commissioners, the assignment hereby made as aforesaid shall become absolutely void." Now it appears to me perfectly clear that any stipulation for the payment of the loan, otherwise than is prescribed by the act, cannot possibly have any effect. The rates having been thus assigned to the Commissioners, rates were duly made for four years, and an annual sum of £227, amounting in the four years to £908, was paid to the Commissioners, the last instalment being paid on the 13th of December, 1853.

It is hardly necessary to advert to the creation of new parishes out of the parish of Wigan, as by the 15th section of the 19 & 20 Vict. c. 104, that makes no difference in the question. It is stated in the special case that the Commissioners applied from time to time for payment of the instalments subsequently due. The nature of those applications is not stated, nor down to what time they were continued. 619] Nor does it appear that the Commissioners *in any way acted upon them. The discontinuance of the payment of the instalments was occasioned by the refusal of the vestry in 1854 to lay a church-rate, and no church-rate has been raised in the parish of Wigan since.

No proceeding on the part of the Commissioners took place until the year 1867, when the Court of Queen's Bench, upon their application, granted a rule on the church-wardens to show cause why a writ of mandamus should not issue, commanding them to make a rate or rates for payment of interest and instalments of the principal, secured by the indenture of the 17th of September, 1849. This rule was enlarged in order that a special case might be stated for the opinion of the court. Upon the argument of the case the court ordered a mandamus to issue commanding the church-wardens to make, levy, and collect a rate for payment of the sum of £227, one year's instalment of the loan of £4,540 due on the 17th of September, 1854, and interest on the balance of the principal sum. Returns were made to the mandamus, which were demurred to. The Court of Queen's Bench gave judgment for the prosecutors on the demurrers, and ordered the peremptory mandamus to issue; which order is now the subject of our consideration. It is unfortunate that there is not the slightest report of any of these proceedings in the Queen's Bench, so that we are deprived of the advantage of knowing the reasons which led the court to the conclusion that the peremptory mandamus

ought to be issued. The Court of Exchequer Chamber has decided unanimously that it ought not to have issued.

In considering the case it is necessary to clear the way of a difficulty which has been raised as to the power of any other court to question the issuing of a writ of mandamus by the Queen's Bench, which it is said is a matter entirely of discretion. The Chief Justice of the Common Pleas appears to me to give some countenance to this suggestion. His Lordship says⁽¹⁾: "There is nothing shown, save that the money has not been paid; and this it may be, by consent of the Commissioners, though, indeed, some years ago, they appeared to have asked for it, but to have made no attempt to enforce compliance with their request by any legal measure. Had this been shown, and if there was a question *whether they had come in a reasonable time, [620 calling on the parish, the same persons as near as might be, to make good their default, then, if the right is discretionary, the judgment of the Queen's Bench on the motion for the mandamus would be final. But no question of discretion of this nature arises in this case." And in another part of his judgment, his Lordship says⁽²⁾: "The judges of the Court of Queen's Bench, supposing it to be a matter of discretion, do not state that they have in fact exercised that discretion upon the particular circumstances of this case, or whether they were of opinion that the Commissioners were entitled to the writ *ex debito justitiæ*, and that no question of discretion arose."

Now there appears to me to have been some little confusion upon this subject, which can easily be removed. A writ of mandamus is a prerogative writ and not a writ of right, and it is in this sense in the discretion of the court whether it shall be granted or not. The court may refuse to grant the writ not only upon the merits, but upon some delay, or other matter, personal to the party applying for it; in this the court exercises a discretion which cannot be questioned. So in cases where the right, in respect of which a rule for a mandamus has been granted, upon showing cause appears to be doubtful, the court frequently grants a mandamus in order that the right may be tried upon the return; this also is a matter of discretion. But where the judges grant a peremptory mandamus, which is a determination of the right, and not a mere dealing with the writ, they decide according to the merits of the case, and not upon their own discretion, and their judgment must be subject to review, as in every other decision in actions before them.

⁽¹⁾ Law Rep., 9 Q. B., 325.

⁽²⁾ Law Rep., 9 Q. B., 323.

Now, ought this mandamus to have issued? That question depends entirely (as I have already said) upon the act of Parliament. The Commissioners of Works could only make loans on certain conditions. The church-wardens could only borrow on certain conditions. The conditions upon the Commissioners are that they must lend on security of rates for the repayment by annual or half-yearly instalments within twenty years at the farthest. They have no power to lend on any other terms. The condition on the church-wardens is that they must borrow on the terms 621] *of repaying the loan by annual or half-yearly rates within twenty years. They can borrow on no other terms. The intention of the act with respect to these loans appears to be that the rate-payers in the parish (a fluctuating body) should be chargeable for twenty years with rates in discharge of the loan, but that rate-payers after twenty years should not be liable, which could not be, unless, after the twenty years, the rates were no longer chargeable with the payment of the loan. This is carefully provided for by the direction as to annual payments to be made in twenty years. Now the mandamus issued in 1871 is to levy a rate for the payment of the instalment due on the 17th of September, 1854. This rate must necessarily be levied more than twenty years from the advancing of the loan, and, as it appears to me, in the teeth of the act. If this can be supported, it will follow that the church-wardens may be called upon year by year for fifteen years from this time to levy rates for the payment of the instalments; for it was considered by the Queen's Bench that the whole arrears can be required to be discharged by a single rate, which, however, would be equally objectionable.

It is unnecessary to examine the cases which have been cited, none of which appears to me to have any application; nor is it necessary to consider when it was incumbent upon the commissioners to be active in enforcing their rights, nor whether they had any remedy personally against the church-wardens under the indenture of the 17th of September, 1849. I confine myself entirely to the act, upon which the whole question turns. And looking to that alone, it seems to me to be perfectly clear that, not by implication only but, by the most express language, it prevents a rate for the repayment of the loan by the Commissioners being made after twenty years from the time when the money was advanced.

I submit to your Lordships that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD HATHERLEY: My Lords, I have come to the same conclusion after hearing the able arguments which have been advanced at the bar on both sides of this question.

I may put out of the case at once what I may call the incidental *question my noble and learned friend has [622 touched upon, namely, the question of how far the direction of the Court of Queen's Bench is to be regarded as a point of discretion on the part of the court. I entirely agree in the view taken by my noble and learned friend, that when the Court of Queen's Bench is invited to make an order by way of peremptory mandamus, it is no more in the power of that court than of any other court, to direct that to be done which is not lawful. Upon a prerogative writ there may arise many matters of discretion which may induce the judges to withhold the grant of it—matters connected with delay, or possibly with the conduct of the parties—and when the judges have exercised their discretion in directing that which is in itself lawful to be done, I apprehend that no other court can question their discretion in so directing. But with regard to that which is in itself not lawful to be done, they are open to correction, as every other court is, by the Court of Appeal, or by a higher authority.

The question we have really to consider in this case is, whether or not that which the church-wardens were, by the mandamus in question, directed to do, was a thing which the church-wardens could by law be ordered under any circumstances to do. That must depend entirely upon the authority derived from the special act of Parliament under which they professed to act. Undoubtedly they have not at common law any right to raise, or direct to be raised, a rate which is for purposes in themselves retrospective. The principle of that is very clear. It is not right, on the one hand, that those who have had the benefit of work done should be exempt for several years, and perhaps exempt altogether, from making any contribution to the expense of the work, and should throw upon those who succeed them the whole of those expenses. And again, as regards the general law, it has been held that, with reference to retrospective rates, except under special powers contained in special acts of Parliament for the purpose, it is not right to throw any past expenditure upon a succeeding class of inhabitants of the district affected by the work.

But it was found by the Legislature that there were certain works, of a permanent character, which it might be wise to execute, and in such cases those who came after

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would have the benefit of those works; and therefore, from 623] time to time, acts of Parliament *have been passed to authorize such works, and public moneys have been vested in certain commissioners called the Commissioners of Loans to assist in executing them. These Commissioners have been authorized to make advances under acts of Parliament, but Parliament has at all times carefully made provision, according to what seemed to be right at the moment, for the payment of those moneys by charges which would affect subsequent inhabitants of the district obtaining the benefit to be secured by the advance of a loan. Among other things the object of building or repairing churches has been considered to be a proper object for such advances. And accordingly in the act of Parliament now before us, among various objects for which the power is given of charging the rates upon the parish, we find that one is the repairing of churches, the object in the case we have before us to-day. Another object (dealt with in the 3d section of the statute) is the building of new churches, and another is increasing the accommodation for students in colleges at the universities. But in all those cases very careful provision is made for the mode in which the loan is to be raised, and the security to be given, and the payment made.

My Lords, we find in the first clause of 5 Geo. 4, c. 36 (which is the clause we have to construe now, the loan being one for the repairing of a church), that provision is made in the first place that the Commissioners may lend moneys, and in the next place that the church-wardens and the overseers may receive a loan; but under certain provisions as to consents and the like which have been complied with in this case; and they having received the loan, then comes this clause under which the Commissioners must now seek the payment of the money lent, if they can obtain it at all: [His Lordship read the section, observing upon the word *required* as marking that the duty imposed on the church-wardens and Commissioners was imperative.]

Now, my Lords, without looking in the first instance to the deed which has been executed under the authority of this section, let us just see what the authorities and powers of the church-wardens were. They could do nothing except under this act; what did the act authorize them to do? They were authorized to assign the rates, and they were authorized to assign them in such a manner, and the instal- 624] ments of the loans were to be payable in *such proportions, and at such times, as should be directed by the Commissioners. But both the Commissioners and the

church-wardens were limited, plainly and distinctly, by the close of this sentence, which tells you in what manner the repayment of the loan was to be secured. It was to be paid, with interest thereon, by instalments spread over a "period of twenty years at farthest" from the advance. It appears to me that they could therefore give no security beyond a security for the payment within that particular time; they could give no security which should postpone the payment, by instalments or otherwise, to any later period than twenty years from the advance.

In giving to the Commissioners full authority to direct how and in what form the annual or half-yearly payments should be made, the Legislature appears to have thought a public body like the Commissioners could be intrusted with the power of seeing that all should be done justly and fairly. Otherwise it might be said that it would be possible, under the particular words of this section, for the Commissioners to say: You can begin to pay the instalments at the tenth year from the date of the advance, paying none in the interim, and so by means of an operation of double instalments, as it were, secure the payment of the advance by the end of the twenty years. But, my Lords, I apprehend that that would not be a reasonable exercise of their duty, and it would not be one which we ought to impute to them, or which the Legislature contemplated as possible on the part of the Commissioners. I make the observation that they have considerable powers given to them as to proportions, and as to times; for the proportions and the times are to be such as the Commissioners may direct; and I apprehend that that power was given for the express purpose of enabling the Commissioners, in a reasonable and proper manner, to take the best steps they could for securing to themselves the payment of the money within twenty years from the advance. They would have to see what a reasonable rate, to be raised in each succeeding year, would be in the particular parish in question—whether there should be an increase or a diminution in the amount, according as the parish might increase or might diminish in population, or the like.

At all events this power furnishes an answer, among other *things, to the objection which has been raised as to [625 the difficulty that might occur with respect to the payment of the last instalment, that difficulty having been of this description. It was said in the course of the argument: "You cannot apply for a rate until the money is due, and if the last instalment will be due at such a time

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that you cannot secure to yourself the payment by a rate, you will have to lose the last instalment altogether." It is an answer to that to say that the Commissioners have power to make such arrangements as to proportions and as to times of making payment as would enable them to have the last instalment paid by means of a rate levied at a time when it would fall within the twenty years. Under this provision in the act arrangements could be made whereby the Commissioners could secure themselves against a loss of that description.

Then we come back again to the question, what is the power the church-wardens have of levying rates, and what is the power the Commissioners have of directing payments? They appear to have acted very properly in their mode of having the deed prepared. I need not go through its details. The deed is so prepared as to recite that it is intended that the payment shall be made in the manner and in the proportions afterwards directed by the Commissioners. Then there comes the assignment of the rates. Then there is a provision which would be called in an ordinary mortgage deed a proviso for redemption, which points out the particular periods at which the instalments shall be paid. The deed being dated August, 1849, the first instalment of a portion of the principal, together with interest, is directed to be paid in September, 1850; and then in each succeeding year the payments of £227 of principal, and an amount of interest, diminishing in proportion as the debt itself would diminish, are to be paid by successive instalments. If everything had been rightly and properly done according to the provisions of the deed, this would have been the mode of paying off the debt. Then it says that the deed will be completely avoided by paying all those instalments. My Lords, I apprehend that that was a very proper form of deed, and I apprehend that all that can be claimed by the Commissioners is that which alone the act authorizes them to receive, and that which they have provided should be paid to them by their deed.

626] *The case is clear of all the authorities which have been cited, because they appear to have been decided upon the simple ground that if there is an express power of charging indefinitely the rates, that power will not be diminished because there is a provision made for the payment of the debt in a certain manner, there being no proviso that if the debt is not paid in that manner the debt is to be acquitted or discharged. If there is a charge upon the whole of the rates indefinitely, and in perpetuity, then the mode of

making the payment which is pointed out will not invalidate the charge. But if you find in an act of Parliament like this, only one particular mode and one particular power of effecting the object, and that power cannot now be farther pursued because the time has been allowed to pass, then, my Lords, I apprehend that all one can say is that the security is not one which will be effective farther than the very form and extent in which it is framed, which must be in pursuance of the act, and that therefore the Commissioners, having been directed to take steps to provide for the payment of these sums as they become due, cannot now, in the year 1874, obtain payment of those instalments which were payable under the deed in the year 1854.

I do not think that any argument arises from any of the other clauses in the same act of Parliament. In fact it is only *idem per idem* to a great extent. If anything, they would rather incline my mind against the view contended for by the appellants, because, after the 4th section of the act has directed that the colleges shall have the power to borrow money and make provision by their deeds for the assignment of the college property, so that the debt may be paid off, like parochial debts, in the course of twenty years, the following section, the 5th, contains an express proviso that no other instruments and no other powers of charging college estates shall have any effect under the act. The other matters contained in the act do not induce me to believe that we are wrong in coming to this conclusion.

LORD O'HAGAN: My Lords, I concur in the judgment of the Exchequer Chamber, but I do not desire to be understood as adopting all the reasons on which that judgment was grounded.

*Twenty-seven years have elapsed since the loan [627 was made of which the Public Works Commissioners now seek the payment, and twenty-two years ago the parishioners of Wigan and the adjacent townships appear to have repudiated liability for that loan, and declined to pay any instalments upon it, and have ever since been allowed by the Commissioners to succeed in their passive resistance to a claim, which was apparently made more than once, but when exactly, how often, or under what circumstances, your Lordships are not at all informed. The Commissioners in no way account for this singular delay and inaction, which is the more remarkable as the statute (5 Geo. 4, c. 36) casts upon them the duty of enforcing the discharge of the debt by yearly or half-yearly rates, "in such proportions and

at such times" as they should think proper "to direct and appoint." Within the lengthened period during which the Commissioners have been so strangely quiescent, it is stated in the various returns to the mandamus, and not denied, that several districts have been severed from the parish to which the loan was made, on the requisition of a majority of its inhabitants, and have become separate parishes for the purpose of levying rates, and entitled to the benefit of the exemption from liability to contribute to the repair of their former parish churches, under sect. 71 of 58 Geo. 3, c. 45, after twenty years from the dates of their consecration. So that if the contention of the appellants could be sustained, the debt incurred by one set of people would be enforced against another. Those who received the benefit will not bear the burthen. A new generation, affected by new acts of Parliament, and holding a new ecclesiastical position, will be visited with the well defined and limited liability of their predecessors, in whose enjoyment of the advantages to which it was originally referable they may not, possibly, in their new circumstances, participate at all. And all this seeming injustice will be occasioned because public officers have failed to do their duty in enforcing a public claim, not from any want of power to do it, or upon any suggestion that the parish which contracted to pay under the statute, year by year, had not ample means available for the purpose, but from the unexplained and unwarrantable neglect [628] to take effectual proceedings *which would have been easy and simple, and must have been effectual.

In this state of facts we come to consider whether the terms of the statute require us, at this time and after all the events which have taken place, to give effect to a claim, so questionable in its staleness, and in its practical operation, if it could be established, so capable of working injustice.

I quite adopt the view of the Attorney-General that a retrospective rate is not necessarily illegal, and that if this be a case of the exercise of discretion by the Court of Queen's Bench *cadit quæstio*. Neither the Exchequer Chamber nor your Lordships' House would then have power to interfere, and the appellants must prevail. But for the reasons already given, there was no exercise of discretion here which could oust the control of this House. In any view the statute, if rightly construed, does not warrant a retrospective rate, but contemplates, and requires, that the loan should be paid from rates leviable within a specified period; then the argument as to discretion does not arise, and we are bound to enforce the intention of the Legislature. The

dictum of Mr. Baron Parke, on which reliance has been placed, not only in the court below but by the learned counsel who have addressed your Lordships, points to that intention as the determining consideration in the case; and if it be, as I think it is, the words of the act seem to me decisive.

The 1st section, by the imperative words "it shall be lawful," casts on the church-wardens and overseers the duty of making, for the payment of the loan obtained on the demand of a majority of the inhabitants of the parish, or of four-fifths of the select vestry, if there be such a body, "such annual or half-yearly rates" for the payment of it "in such proportions and at such times as shall be directed and appointed" by the Commissioners, and to assign them so as to secure the payment of all sums so advanced, "with interest," by annual or half-yearly instalments, "within the period of twenty years at farthest," from the advancing of such sums. Could a clause have been framed with more elaborate care to secure the payment within the twenty years? It has not a negative provision but its affirmative words are very stringent. The rates are to be made "so as to [629 secure repayment"—of what?—"of *all* sums," that is, of everything which has been advanced "within the period of twenty years." This seems clear enough, but to render the purpose of the act, if possible, more unmistakable, it adds "at farthest," and fixes the period so as to make it run from the time of the first advance made to the parishioners.

And this emphatic declaration of intention to have the payment made within the twenty years is repeated over and over again in the 3d and 4th sections with equal force. I decline to give an opinion upon the construction of those sections, because it is not required for the case which is now before the House. I therefore withhold any opinion, as has been done by my noble and learned friend opposite (Lord Hatherley). But if an opinion were to be given at this moment, I should say that the other sections ought to be construed as I construe the 1st section, and not according to the view presented by the Attorney-General and by Mr. Cowie, that those two sections ought to be interpreted as not limiting the period of payment.

I do not know how language could have made the intent more clear, and I can see no sufficient reason for holding the clause directory. Words, though affirmative, are not necessarily so if they are "absolute, explicit, and peremptory," and so, in my opinion, they are here. No doubt express words forbidding any action after twenty years might have

been added, and then there would have been no room for controversy. But Mr. Baron Parke thought, of course, that the prohibition of a retrospective rate might be made impliedly or expressly. And if the intention here is indicated by words which are unequivocal, and if the Legislature has supplied all facilities for carrying that intention into effect by compelling the parish to make the rate, and arming the Commissioners with ample authority to regulate the making of it, so as to have full payment assured within the time specified, the implication seems to me natural and reasonable that the Legislature did not mean to allow the making of it after that time had passed.

I, therefore, agree with the Exchequer Chamber as of the 630] *construction of the statute, and I do so the more willingly because it is in manifest accordance with its policy, and as I conceive essential to its equitable operation. It is of importance that public officers should not be encouraged to sleep at their posts, and postpone the fulfilment of their duties, in the expectation that their delay will be condoned and their demands conceded, whatever may have been the lapse of time or the change of circumstances. It is important to the community that the public funds advanced for meritorious purposes should not be lost from neglect in enforcing payment for them; and it is of equal importance that persons who never sought the advance, or desired benefit from it, should not be made responsible when those who, at their own instance, became liable have passed away.

As to the 15th section of the 19 & 20 Vict. c. 104, it leaves the "legal liabilities" of borrowers under acts of Parliament where it found them, and does not, in my judgment, operate in the least to revive the claim of the Commissioners if it ceased to be enforceable at the end of the twenty years.

As to the authorities which have been cited for the appellants, my noble and learned friends have dealt with them sufficiently. In all cases of construction like this the specific terms of each statute must be carefully considered, and those authorities will be found to apply to acts quite distinguishable from that before us. Lord Coleridge has pointed out that in *Reg. v. St. Michael, Southampton* (1) and *Reg. v. Hurstbourne Tarrant* (2) the amounts in question were charged upon the rates, whereas in this case they were not. In the first of these cases Mr. Justice Erle relies on the fact that the obligee of the bonds was not required to enforce annual payments, as he hopes, in justice towards future rate-payers, future legislation may provide. In the

(1) 6 El. & Bl., 807.

(2) El., Bl. & Bl., 246.

second case, Lord Campbell takes notice of the fact that the rates are charged; Mr. Justice Erle and the other judges note that no duty to enforce payment is imposed on the bondholder; and Mr. Justice Erle says: "It would, I think, be highly satisfactory if it were, in all such cases, made obligatory on the creditor to enforce payment at once. If the act had said that the charge should be paid off within five *years, and not otherwise, it would have made [63] it the duty of the creditor to secure it in time." Here the act clearly says that the debt shall be paid within twenty years, and within twenty years "at farthest," and the Commissioners get power to have payment made "in such proportions and at such times" as they shall direct and appoint. I shall only add that in those cases, and in every other which has been relied on, the phraseology of the acts has been very different from that with which we are dealing, and in none of them will be found the strong, clear, and unequivocal limitation which warrants us in adopting a view consonant, in my opinion, at once with legal principle and natural justice.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Lords' Journals, 3d July, 1876.

Solicitors for the appellant: *Barnes & Bernard.*

Solicitors for the respondent: *Paterson, Snow & Burney; Sharpe, Parkers, Pritchard & Sharpe.*

See Mr. Shepard's learned and very elaborate essay on mandamus, in note to second edition of 2 Johnson's Cases, 217.

The writ of mandamus is a prerogative writ which the court will issue or withhold, according to its discretion: *People v. Dayton*, 8 Weekly Dig., 841; *Van Rensselaer v. Sheriff*, 1 Cowen, 502; *Ex parte Fleming*, 4 Hill, 583-4; *People v. Canal Board*, 13 Barb., 450; *People v. Croton, etc., Board*, 49 Barb., 261; *People v. Contracting Board*, 27 N. Y., 378; *People v. Contracting Board*, 33 N. Y., 382.

But although the court may grant or refuse the writ in its discretion, yet this discretion is not to be merely arbitrary and capricious, but is to be regulated by well settled rules and principles of law, which have been incorporated into our system of judicature; and they will be uniformly regarded in deter-

mining the question whether the writ shall be awarded or not: 2 Johns. Cas. (2d ed.), 217-4; *State v. Bruce*, 1 Treadway's (S. C.) Rep., 165, 176.

The courts and authors have frequently had occasion to speak of what is a sound legal discretion.

In *Gordon v. Longest* (16 Peter's U. S. Rep., 97), the court said: "From the decision of the state judge, he seemed to consider the application for the removal of the cause as a matter to be decided by his discretion. But he must exercise a legal discretion. The defendant was entitled to a right under a law of the United States: and, on the facts of the case, the judge had no discretion to withhold that right."

In *Goddard v. Coffin* (Davies' Rep., 391), Ware, district judge, said: "It is true that a motion for a new trial is addressed to the discretion of the court; but this is a judicial discretion, and

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though from its very nature it cannot be limited by any precise and arbitrary rule, it is to be determined by the judicial conscience of the court; and when that is convinced, by the view of the whole case, that justice requires a new trial to be had, the court is as much bound so to decide as when the decision of the question before it turns on a positive rule of law. The court has no more moral or judicial right to violate the sanctity of its own conscience, than it has to violate the rules of law. When a question is addressed to discretion, the obligations of conscience are as imperious as those of law, when the question is addressed to the law. And if a party is successful in convincing the conscience of the court, that justice, consistently with the rules of law, requires the interposition of its discretionary action, he is as much entitled to it, as when he claims the benefit of the positive rules of law, and the court is as much bound to render that justice which he asks."

In *People v. Vermilyea* (7 Cowen, 869, 384-9), it was held that the court has a discretion as to putting off the trial of a cause; but it is a *legal* discretion; and if not properly exercised by a judge at the circuit, the Supreme Court will interfere, on motion. Judge Woodworth said (p. 398-9): "I admit that in reviewing the decision, which is considered as resting upon discretion, we should be careful not to overrule it, unless the rules of law have been violated. What is judicial discretion? It is an enlightened view of the case, and a correct application of the known rules of law. In the view which I have of this case it can hardly be said there was a discretion. The application seems to be as plainly within certain fixed and known rules of law as almost any other. Discretion itself, however, is not arbitrary. That too is confined by rules of law."

See also *Bailey v. Stewart*, 2 Redf. Surr. Rep., 213.

In his remarks upon the death of ex-Judge Greene C. Bronson Judge Sutherland remarked: "Lord Camden said, in a dissenting opinion unsurpassed for judicial eloquence, that 'the discretion of a judge is the law of tyrants: it is always unknown: it is different in different men: it is casual, and depends

upon constitution, temper, and passion.'" 40 Barb. 667.

In a note to Thompson's case (8 Howell's State Trials, 56), Mr. Evans's letter to Sir Samuel Romilly is given. He says: "As for discretion I am for investing the judges with as little as possible. We know that some men view matters in a different light from that in which they are seen by others. 'The discretion of the judge' (says Mr. Gibbon very truly) 'is the first engine of tyranny; the laws of a free people should foresee and determine every question that may probably arise in the exercise of power and the transactions of industry' (Decline and Fall, etc., vol. 8, p. 111).

"To this I will add the memorable words which were used by Lord Camden in the case of Hinson and Kersey, in the court of Common Pleas, when he was Chief Justice of that court: 'The discretion of a judge is the law of tyrants: it is always unknown: it is different in different men: it is casual, and depends upon constitution, temper, passion. In the best, it is oftentimes caprice: in the worst, it is every vice, folly and passion to which human nature is liable.' Mr. Burke, in his 'Thoughts on the Present Discontents' goes so far as to assert that 'all men possessed of an uncontrolled discretionary power leading to aggrandisement and profit of their own body have always abused it.'"

See also 3 Coke's Inst., 51; Ram's Legal Judgments (Townsend's ed.), 68-64, and authorities cited.

In *Webster v. French* (11 Illinois, 272-3, 10 N. Y. Legal Observer, 124), the court said: "But it is said that the governor was vested with the sole authority to determine who is the highest responsible bidder, and that his decision in the exercise of this discretionary power is conclusive. At most but a part of this proposition is true. Discretion is not the exercise of the will, but of the *judgment*, when applied to a question capable of being determined in different ways. Ordinarily with the exercise of such a discretion, other tribunals will not interfere. But in no sense of the word can a man have a discretion to determine which of two given sums or numbers is the greater. That must be determined by compari-

son alone and not by the judgment. The governor was not authorized to receive any but legal bids, and we have already seen that the proposition of Ash and Diller was not such a bid. In no event, then, could it be brought in competition with the bid of the complainants. It was impossible that the exercise of a discretion should be involved in determining which was the highest bid, and hence no such discretion could be conferred."

In speaking of the death penalty in England, which until recently was the punishment for a large proportion of crimes, Mr. May, the historian (2 May's Constitutional Hist., chap. 18, 1st Am. ed., 556) says, "Not one in twenty of the sentences were carried into execution. Hence arose uncertainty—one of the worst defects in criminal jurisprudence. Punishment lost at once its terrors, and its example. Criminals were not deterred from crime, when its consequences were a lottery; society could not profit by the sufferings of guilt, when none could comprehend why one man was hung and another saved from the gallows. The law was in the breast of the judge; the lives of men were at the mercy of his temper, or caprice. At one assize time, a 'hanging judge' left a score of victims for execution; at another, a milder magistrate reprieved the wretches whom the law condemned."

Bentham (6 Bentham's Works, Bowring's ed., p. 97, note) says: "Under judge-made law, all judicial power is arbitrary—essentially and immediately arbitrary. Where there is no fixed standard, on whom can aberration justly be chargeable? Where there is nothing to *err from*, how can aberration ever have place?"

Again in urging the adoption of a rule allowing all persons to be witnesses (Id., page 146, Rationale of Judicial Evidence, chap. 32), after speaking of the rivalry between Lord Mansfield and Lord Camden, then Chief Justice Pratt, and of the occasion which called out the remarks of the Chief Justice of the Common Pleas, in illustrating his assertion that the views of the same judge would be changed by circumstances, Bentham says: "In the course of the contest; the

word *discretion*, being on every occasion employed by every judge, had probably enough been employed by the Lord Chief Justice of the King's Bench; and by that noble and learned person, on that occasion as on others, *discretion* had probably been spoken of as a sort of faculty or mental qualification, which, in the execution of his office, it might not be altogether improper for a man in the situation and character of a judge to be provided with and to exercise. Not a syllable more was then and there wanting to satisfy the learned and right honorable the Lord Chief Justice of the Common Bench—then not as yet a Lord of Parliament—that *discretion* was not only a bad quality, but a quality at least, if by an oblique cast it could be stuck upon the sleeve of the Lord Chief Justice of the Upper Bench, odious; odious, if not absolutely and to everybody without exception, at any rate to every man whom it found disposed to hate Lord Mansfield for doing what he did, whatever that might be.

"The discretion of a judge' says he, in his Genuine Argument, bawling out all the way to the eye in capitals—the discretion of a judge is the law of tyrants: it is always unknown: it is different in different men: it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every folly and passion to which human nature is liable."

"Till this time, discretion had passed if not for a heroic virtue, at any rate for an innocent and not altogether useless quality; nor, in the situation of a judge, not to speak of inferior ones, would it have been pleasant to a man to be thought altogether destitute of it.

"From that time, by the worshippers at least of the first Lord Camden, it has on all proper occasions been deemed and taken to be that bad thing which he discovered it to be; and indefatigable was the applause which the discovery had been worth to him in his time.

"Now suppose two professors of the art of venal eloquence—one paid for being a *liberalist*, the other for being a *rigorist*. Out comes the one with the

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vaporing about *Siderfin* and *Keble*: out comes the other with the invective against *discretion*: to which of them will the laurel be due? Judgment seat, the jury box, gifts of nature equal: Answer—To him who with most fruit has sitted at the feet of Sidons. Judgment seat the bench: Answer—Who dare?

"The curious thing is, that the dart thus aimed at the enemy goes through and through the very heart of their common mother, *Common Law* herself. What, in the way of insinuation, was predicated of, and meant to be deemed and taken to be peculiar to the works of that one of her children, would, upon the strictest examination, be found to be with the strictest truth predicable, and, if she should so long live, will continue for ever predicable, of herself and all her works. The picture is drawn in lively colors, and, to render it a most correct likeness, needs no other change than of the name—for *discretion of a judge*, read *common law*.

"Behold here, then, the great, the important difference—that between common and statute law. As to the demirep's two fighting children, of whom the tory was the better tempered and the better bred, the difference was never to an honest man worth thinking out. 'It was casual, and depended upon situation.' Had Murray been a Rigidist, Pratt would have been a Liberalist; had Murray been a Whig, Pratt would have been a Tory. The difference?

"It was between Bavius and Mævius. Both were enemies, as every admirer of common, in contradistinction to statute law, is, and ever will be—both alike sworn enemies to security in society, to certainty in law."

"In this way equity would become in fact, what old Selden, in the jealous spirit of a common lawyer, long ago accused it of being: 'A roguish thing: It is according to the conscience of him that is chancellor, and as that is larger or narrower so is equity. 'Tis all one as if they should make the standard for measure a chancellor's foot; what an uncertain measure would that be? One chancellor hath a long foot, another a short foot. 'Tis the same thing

in the chancellor's conscience: "' Verplanck on Contracts, 202.

"Such conduct may seem harsh and repulsive, but it is very far from being fraudulent. It is the enforcement of a legal right, operating oppressively in the particular case, but against which it is difficult for law or equity to afford relief, without substituting the undefined and therefore dangerous discretion of a court, for the fixed principles upon which the law in relation to contracts should be administered:" *Pike v. Butler*, 4 N. Y. Rep., 360, 363.

"It is to be a sound judicial discretion, not arbitrarily or capriciously, but reasonably according to the circumstances of the particular case:" *Willard's Eq.* (Potter's ed.), 263, citing *Quinn v. Roath*, 37 Conn., 16.

Again, "The discretion which courts of equity exercise, in matters of this kind, is not a mere arbitrary discretion, but is a sound and reasonable discretion, and regulated upon grounds that make it judicial:" *Willard's Eq.* (Potter's ed.), 303, citing *Seymour v. Delancy*, 3 Cowen, 505; *White v. Damon*, 7 Ves., 85, and *Buckle v. Mitchell*, 18 Ves., 111.

See also *Willard's Eq.* (Potter's ed.), 89, citing *Rook's Case*, 5 Coke Rep., 99 b.; *Tripp v. Cook*, 26 Wend., 151-2; *Dows v. Congdon*, 28 N. Y., 126-7; *Cook v. Bennett*, 51 N. H., 92; *Bundy v. Hyde*, 50 N. H., 116; *Dole v. Johnson*, 50 N. H., 452; 1 Story's Eq. Jur., §§ 18-22.

Counsel are frequently heard to urge that an observance of the rules of the courts, is a matter of discretion. The courts, however, have invariably, so far as they have spoken, promptly repudiated such a doctrine.

In *Wells v. Lane* (15 Wend., 106), the Court of Errors said, "I agree with the Supreme Court, that the Court of Common Pleas may repeal their rule; but while it remains in force they are bound, in my judgment, to give it effect. It is, perhaps, well that this opportunity is offered to correct an opinion which has in some measure obtained, that a court of common pleas may alter their rules to meet the matter or cause under consideration, and dispose of it as they please without any regard to the rule. This often-

times works great injustice, and should not be tolerated; the rules of a court are the law of the court, and courts have no right to alter their rules to meet or affect any particular matter then under consideration; but every question is to be determined by the rules as they exist at the time the question arises, as much so as if the rule was a positive legislative enactment. If they find the rule to be inconvenient, after disposing of the matter or cause affected by the rule, they may alter or modify it as they shall see fit."

See also Broom's Maxims (7th Am. ed.), 132, *maxim cursus curiae est lex curiae*.

Though it has been held that rules of practice may be departed from in particular cases, when the observance of them would not answer the purposes for which they were made, but would encourage sham pleading: *Harrison v. Richardson, McClelland & Younge*, 246.

In the matter of *Livingston's Petition* (2 Abb. N.S., 3, 23, 27; 34 N. Y., 575, 576-7, 581), it was held as to the equitable rule that a motion once decided should not be renewed before another judge. "That the rules and practice of the court have been established to protect the rights of parties, and constitute a part of the equitable jurisprudence of this community, and a departure from them may be ground for reversing an order appealed from."

Where facts, in the moving affidavits, constituting the basis of the relator's title to relief, or in the answering affidavits which, if true, would be a good and valid defence against a mandamus, are denied, a peremptory writ should not go in the first instance, but an alternative writ should be allowed: *People ex rel. Mott v. Supervisors*, 64 N. Y., 600; *People v. Contracting Board*, 27 N. Y., 378; *People v. Contracting Board*, 33 N. Y., 382.

But when no fact constituting the relator's claim is denied or in any manner controverted, and the relator seeks to avoid them by other alleged facts which, if true, do not, as matter of law, constitute a good defence to the application, a peremptory writ should be issued in the first instance.

In *People v. Mitchell* (35 N. Y., 556),

the court said: "It is claimed that a peremptory mandamus should not have been awarded in the first instance. In this view we cannot concur. There is no occasion for an alternative writ, when there is no substantial conflict between the parties as to the truth of any material fact essential to the determination of their legal rights."

Where the facts showing a valid right to relief by mandamus are not disputed, and no valid defense is shown in the answering affidavits, it is the duty of the court to determine the legal rights of the party on the undisputed facts, and award a peremptory mandamus accordingly.

Where, according to well-settled cases or rules of law, on all the papers the relator is entitled to the relief asked for, a peremptory writ should go in the first instance. It is sufficient that no defense appears upon the papers: *People v. Supervisors of Otsego*, 51 N. Y., 409-410; *People v. Supervisors of Ulster*, 65 N. Y., 300, reversing S. C., 63 Barb., 83; *People v. Nostrand*, 46 N. Y., 375; *People v. Tompkins*, 64 N. Y., 53; *People ex rel. v. Board, etc.*, 63 N. Y., 623; *People v. Palmer*, 52 N. Y., 83; *Ex parte Rogers*, 7 Cowen, 526; *Achley's Case*, 4 Abb. Pr., 35.

In the case of the *People ex rel. Churchman v. Board of Trustees*, 58 N. Y., 654, a peremptory mandamus was refused by the special and the general terms of the Supreme Court. It appearing by the affidavits used on the motion that the relator was entitled to the relief asked for, the Court of Appeals reversed both orders and directed a peremptory mandamus to go in the first instance.

So also in *People v. Supervisors*, 32 N. Y., 473.

As to that portion of the principal case holding that the church-wardens and overseers had no power to make the rate after twenty years, it, we think, is clearly not good law in this country. The time fixed would be held to be merely directory, and it would be held that they could do so after its expiration: *Matter of Stevenson's Petition*, 2 Am. Law Reg., N.S., 409, note at end of case; *People v. Allen*, 6 Wend., 486; *Gale v. Mead*, 2 Denio, 160;

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People v. Yonkers, 39 Barb., 266; See Hardman v. Bowen, 39 N. Y.,
 Dawson v. People, 25 N. Y., 399; 196; Barnes v. Badger, 41 Barb., 98;
 People v. Supervisors, 34 N. Y., 268; Striker v. Kelly, 7 Hill, 9; Marchant
 Juliard v. Rathbone, 39 N. Y., 369; v. Langworthy, 6 Hill, 646; People v.
 874-5, affirming 39 Barb., 97; Sedg- Supervisors, 11 Abb. Pr., 114.
 wick's Const. Statutes (2d ed.), 316-325.

[1 Appeal Cases, 682.]

H.L. (E.), July 10, 11, 1876.

[HOUSE OF LORDS.]

632] *WILLIAM MANLEY HALL DIXON, Appellant; and
 THE LONDON SMALL ARMS COMPANY, LIMITED, Respon-
 dent (').

Patent—Infringement—Crown—Servants or Agents.

The Crown has the right to the use of a patented process or invention without compensation to the patentee.

Per LORD SELBORNE: This right of the Crown is not because the Crown is impliedly excepted from the effect of the letters patent, but because the privilege thereby granted is granted against the subjects only, and not against the Crown.

A patent in the usual terms was granted for an improvement in the manufacture of fire-arms. The Secretary at War issued a notice for a tender for the supply of 13,875 rifles of the description known as that patented. The price was settled, *minus* the cost of the steel barrels and the stocks, which the war office was to supply. The rifles were to be delivered within a certain time, the manufacture of them might be inspected at any time, and they might be rejected by officers at the war office, if not made according to pattern, or not delivered in time. The persons who took the contract employed the patented process in the formation and insertion of the lock:

Held, that they were liable to the patentee for an infringement of the patent, for that they were not servants or agents of the Crown doing the work of the Crown, but were private contractors with the Crown to supply a certain manufactured article, and were therefore not protected in what they did by any particular privilege attaching to the Crown.

Feather v. The Queen (') considered, and assumed to be rightly decided; but not to be extended.

THIS was an appeal against a decision of the Court of Appeal, by which a judgment of the Court of Queen's Bench had been reversed.

The appellant, Mr. Dixon, as managing director of the National Arms and Ammunition Company, Limited, was the holder of certain patents for improvements in the manufacture of small arms known as the Martini-Henry rifles. The respondents were the persons forming the London Small
633] Arms Company, Limited, and carried *on business at the Victoria Park Mills, Old Ford. The appellant brought an action against the respondents alleging that they had used his patented inventions in the rifles supplied

(') Affirming 16 Eng. R., 417; reversing 11 Eng. R., 198. (') 6 B. & S., 257; 35 L. J. (Q.B.), 200.

by them to the government, and he sought compensation for the infringement.

It was referred to a barrister to state the facts in a special case. The case set forth that about the 16th of April, 1872, in answer to an advertisement issued by the Secretary of State for War, the respondents sent in a tender for the supply of 13,875 Martini-Henry rifles, which tender was accepted, and the rifles had since been supplied under the contract, and accepted by the Secretary of State for War for the use of Her Majesty and the public service. In the manufacture of these rifles the methods of the plaintiff's patents applicable to the locks were employed, and it was in respect of such employment of them that the plaintiff claimed compensation. The case stated that, "for the purpose of raising the question of law, but for no other or farther purpose, the defendants agree that the rifles so manufactured for, and accepted by, Her Majesty's Secretary of State, under the said contract, would, but for the fact that they were manufactured and delivered to Her Majesty's said Secretary of State for the public service and use of Her Majesty, and under the contract as aforesaid, have been infringements of the said letters patent."

The patent was for improvement in the manufacture of breech-loading fire-arms, and contained the usual provision granting the exclusive right to the patentee, "his executors, administrators, and assigns, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he the patentee, his executors, administrators, and assigns, shall at any time agree with, and no other ('), to use the said invention." It also contained the usual prohibition against "any person, bodies politic and corporate, and all other our subjects within the United *Kingdom," [634 &c., using the invention during the term of fourteen years granted in the patent, except with the license of the patentee or his executors, &c. There was a provision that if the patentee "shall not supply, or cause to be supplied, for our service all such articles of the said invention as he shall be required to supply by the officers or ministers administering the department of our service for the use of which the same shall be required, in such manner and at such times,

(1) In the course of the argument the Lord Chancellor suggested that in order to ascertain the meaning of the Legislature there might, after the words "and no others," be assumed to be added these words, "excepting officers and servants of the Crown acting on behalf of, and for

the use of, the Crown." The Solicitor-General proposed to insert the word "agents," so that the passage should read, "officers, agents, and servants;" and the Lord Chancellor assented to the proposal. See his Lordship's remarks on this matter in his judgment.

and at and upon such reasonable prices and terms as shall be settled for that purpose, by the said officers or commissioners requiring the same, that then, or in any of the said cases, these our letters patent," &c., shall be void.

By the terms of the contract the respondents bound themselves to supply and deliver the articles described in a schedule according to patterns which were to be supplied from the Crown stores. The articles supplied were to be examined by officers, who had the power to reject them.

The schedule referred to was in the following terms: "13,875 rifles, Martini-Henry, without swords, bayonets, or scabbards, at £3 10s. each, less 7s. 6d. each for steel tube and 2s. 2d. each for stock." Patterns were to be seen at the Royal Small Arms Factory, Enfield. "Materials for barrels and stock to be issued from the government stores." The viewing during the process of manufacture was to take place at Old Ford. "The deliveries of these rifles are to commence six months after receipt of correct patterns and gauges, and to proceed at the rate of 1,200 per month," the whole to be completed by the 1st of July, 1874⁽¹⁾.

The case was argued in the Court of Queen's Bench, and the judges there, on the 26th of January, 1875, gave judgment in favor of the plaintiff⁽²⁾. On the 25th of February, 1876, the Court of Appeal reversed that judgment⁽³⁾, and this appeal was brought.

635] *Sir W. V. Harcourt, Q.C., and Mr. Aston, Q.C. (Mr. Macrory was with them), for the appellant: The object of this appeal is to consider the authority, or, if that is deemed to be established, the applicability to this case of *Feather v. The Queen*⁽⁴⁾. It is submitted that that case is not to be supported; but, at all events, the doctrine there laid down is, as it was said in the present case in the court below, "not to be extended." Secondly, it is submitted that, assuming that case to lay down the law correctly, still no private person can use (as of course) a patented process, merely because the article on which he uses it is to be supplied to the Crown. And, thirdly, it is submitted that, supposing the Crown to have the power to authorize a pri-

⁽¹⁾ The following minute was on the books at the war office: "That the companies shall be protected by this department against the patentees in the manufacture of the arms to be contracted for." It was not stated that this minute was communicated to the respondents before the contract, or had formed part of the

contract. But it was stated that the case for the respondents was really argued on behalf of the government.

⁽²⁾ Law Rep., 10 Q. B., 130; 11 Eng. R., 198.

⁽³⁾ 1 Q. B. D., 384; 16 Eng. R., 417.

⁽⁴⁾ 6 B. & S., 257; 35 L. J. (Q.B.), 200.

vate person so to use a patented process, it has not given any such authority in the present case.

[THE HOUSE desired the learned counsel to confine their arguments to the second and third points.]

Arguments continued. The Crown here did not make a contract with the respondents to manufacture articles of a certain sort, after a certain mode of manufacture. The statement in the plea to that effect is erroneous. The contract was to provide and deliver. That contract might have been fulfilled to the letter without the respondents manufacturing anything. They might have made a contract with the appellant, or with any one of his licensees, to manufacture the article, and could then have satisfied their own contract by supplying to the Crown the already manufactured article. This consideration, therefore, renders the case of *Feather v. The Queen* (') inapplicable.

But, still assuming the case of *Feather v. The Queen* (') to have been rightly decided, there is another ground on which it is inapplicable to the present. The Crown may have a right freely to use a patent without remunerating the patentee; but the Crown can only so use it by its own officers or servants. The respondents were not the officers or servants of the Crown, but were mere contractors who undertook to supply certain manufactured articles to the Crown.

It will be argued that there is no difference between a person who contracts with the Crown to do work for the Crown, and a *person who is an officer or servant of the [636 Crown. But the distinction exists, and is considerable. To deny that distinction would be a dangerous doctrine for the Crown, for to hold that all persons who do anything for the Crown are to be considered its servants, might introduce all the consequences of that doctrine, as to the liability of a master for the acts of his servant, which was the subject of consideration in *Laugher v. Pointer* (*). Then, if contractor with the Crown, and servant of the Crown, are not the same, so far as the liability of the Crown is concerned, they cannot be the same for any other purpose; certainly not so for giving the contractor privileges and advantages which, if the Crown possessed them, could only be given by the Crown to its own officers and servants, working for its purposes, and acting under its direct control.

The Crown supplied these contractors with the barrel and the stock. What they added of their own was something manufactured by the patented process of the plaintiff, and

(') 6 B. & S., 257; 35 L. J. (Q. B.), 290.

(*) 5 B. & C., 547.

for the use of that process the contractors had given him no compensation. They might have bought the patented article from the patentee, or from one of his licensees, but they made it in their own workshop, without his license and without any payment to him for its use, and he was therefore entitled to compensation.

They had no right to do this; and, assuming that the Crown had the right to do it, the Crown had not by the contract conferred (and, it might be contended, could not by any contract confer) the right on the contractors. The Crown gave the profit to the patentee as a payment for the value of his invention. It could not, as a matter of caprice, take away from him the source of that profit and give it to some one else. That would be to defeat its own grant to one subject for the profit of another, which it cannot do. It is contrary not only to the spirit of the act of Confirmation of Grants, 43 Eliz. c. 1, but is in direct contradiction to the words of the patent itself, which says that it is to be construed in a sense the most favorable to the patentee. But, even if the Crown did possess this extraordinary right of conferring on one subject the power to render nugatory a grant it had made to another, it had not done so in the present instance.

[637] *It is therefore submitted that, if the Crown by any implied reservation of right in the grant of a patent may, without compensation to the patentee, use the patented process, it cannot grant that right to any subject for his own individual profit, and that in this particular case it has not by its contract with the respondents affected to confer on them such an advantage.

The *Solicitor-General* (Sir *H. Giffard*), and Mr. *C. Bowen*, for the respondents: The infringement complained of here, is the mere use of that particular part of the invention which consists of the application of the lock to the stock and barrel—that was a part of the manufacture of the rifle—and the act of manufacturing was done for the Crown. The contract itself shows that to be so. The respondents were bound to make the whole rifle, the Crown supplying some of the materials for the manufacture, but at the making of each portion the Crown had a right, by its examining officers, to intervene and examine the work. That shows that a manufacturing was intended and contracted for. Everything proves that the Crown required the work to be done for itself and in the public service. Then the work is protected under the authority of *Feather v. The Queen* (1), and

(1) 6 E. & S., 257; 35 L. J. (Q.B.), 200.

public policy required that it should be so protected. [LORD PENZANCE referred to the minute in the war office, which declared that the contractors should be protected against the patentees. Sir W. Harcourt observed that that declaration was not properly in the contract itself; but even if it had been there originally, it would, as Mr. Justice Mellor said (1), make no difference whatever in the matter.]

Argument for the respondents continued: The respondents here were acting as the servants of the Crown. It can make no difference, with regard to their possessing that character in this particular matter, whether they were or were not persons in the ordinary and daily service of the Crown. They were in its service for the purpose of making these rifles; they were to obey its orders, and if they did not, might be punished by the rejection of the article produced. Everything was to be done directly under the authority of the Secretary at War—that is, the [638 authority of the Crown. Then the Secretary at War, that is, the Crown, is alone responsible to the appellant here, for the mode in which that work is done; for *Gibson v. Brand* (2) decided that when A. gave orders to B. to manufacture an article according to a patented process, A. who gave the order, and not B., who executed it, was liable for the infringement. And the same principle was acted upon in *Ellis v. The Sheffield Gas Company* (3). So that both these cases go to establish that the employer is the person liable, the mere executant of the work being his servant and agent. [The LORD CHANCELLOR here suggested the introduction into the patent of the words already referred to (see *ante*, p. 633), and the argument proceeded on the assumption that they were introduced.]

Assuming then, that if the respondents were agents of the Crown, that is, persons doing this work for the Crown, on the order of the Crown, and for the service of the Crown, it is clear that they cannot here be personally responsible to the appellant. The Crown, which employed them, employed them as its agents, and is alone responsible for the acts of its agents. That principle of the liability of the employer was fully sustained by the Court of Exchequer Chamber in *Gray v. Pullen and Hubble* (4), where a person having under statute a power to order a thing to be done, employed a contractor to do it, and the contractor did it, but did it so negligently that a mischief happened. In an action for damages by the person who had suffered the

(1) Law Rep., 10 Q. B., at p. 136.

(2) 2 El. & Bl., 767.

(3) 4 Man. & G., 179.

(4) 5 B. & S., 970.

mischief, the court, reversing a judgment of the Court of Queen's Bench, held that the employer was personally responsible and not his agent. And that was in conformity with *Hole v. The Sittingbourne and Sheerness Railway Company* (*). In that case a railway company which had the power and authority to build a bridge, employed a contractor to build it, and as the bridge occasioned an injury to a shipowner, the company was held responsible to him. Mr. Baron Martin's observations on the case (*) are very strong upon the point. It is not necessary to make one man liable for the act of another, that the relation of [639] principal and agent should, in *strictness, subsist between them. The above cited cases apply, in principle, here. Here the employment was by the Crown, the work was done by the order of the Crown, and in the service of the Crown, and for the use of the Crown and the public. Then the rule laid down in *Feather v. The Queen* (*) applies, and the respondents cannot be made personally responsible.

Sir W. V. Harcourt replied.

THE LORD CHANCELLOR (Lord Cairns): My Lords, the question in this case is one of great importance to the parties concerned, and of considerable general interest. It has been very elaborately argued at the bar; but I think you do not entertain any doubt as to the conclusion at which you should arrive.

I will remind you that the respondents undertook to manufacture for the Crown through one of its departments, the department of the War Office, a certain number of rifles. The appellant is the owner of one or more patents connected with the manufacture of small arms. He complains that the respondents, in executing the order to which I have referred, have infringed his patent rights. For the purpose of the argument it is admitted between the parties that the patents belonging to the appellant are to be taken as valid; and that it is also to be taken, for the purpose of the present argument, that if those rifles had been supplied to any subject in this country, the manufacture of them was of such a kind that it would have been an infringement of the patent rights of the appellant. That narrows the question considerably, and it is still farther narrowed, for it has been insisted on the part of the appellant, and was not, so far as I could understand, controverted by the respondents, that the part of the rifles manufactured

(*) 6 H. & N., 488.

(*) 6 B. & S., 257; 35 L. J. (Q.B.), 200.

(*) At p. 498.

which is an infringement (at all events, for the purpose of this argument) of the rights of the appellant, is that which is called the breech-action, or the lock of the manufactured rifle.

My Lords, bearing those matters in mind, I may add that the respondents contend that they are not answerable to the demand *of the appellant for these reasons. In the [640 first place, they say that it must be taken as established by the case of *Feather v. The Queen* ('), decided in the year 1865, that the Crown is not bound by the monopoly created through the grant of letters patent; and they contend that in manufacturing these rifles under the order to which I have referred, and to the particular wording of which I shall presently advert, they were manufacturing the rifles for the Crown, and that, whatever exemption from the stringency of letters patent existed in the Crown, they are entitled to, and that consequently they are not answerable to the claim of the appellant. My Lords, to that the appellant replies by three propositions. In the first place, he asserts that the case of *Feather v. The Queen* (') was not properly decided; and he contends, as he is entitled to do, that it is an erroneous decision. In the second place, he contends that even supposing that case to have been rightly decided, yet that in the present instance the respondents were not in the position of servants or of agents of the Crown, and entitled to the privilege of the Crown. And, in the third place, he contends that even if that was their position, in point of law and in point of fact, still, in this particular case, having regard to the wording of the contract between them and the Crown, the privilege of manufacturing free from the rights of the patentee was not passed by the Crown to them, or intended by the Crown to be exercised by them.

My Lords, when these propositions on the part of the appellant were stated to your Lordships, you determined that, in the first instance, at all events, you would hear the argument upon the second and the third of those propositions, and not upon the first. The argument has proceeded upon that footing, and I think your Lordships will be able to dispose of the case with reference to the argument upon those second and third propositions. I advert to that for the purpose of making it clear that your Lordships will assume, without finding it necessary to declare, that the case of *Feather v. The Queen* (') was properly decided.

My Lords, I have spoken of the second and the third propositions in the argument of the appellant; but in point

(') 6 B. & S., 257; 35 L. J. (Q.B.), 200.

of fact I think you will find that those two propositions [641] really centre *themselves in the second. I think when your Lordships have adverted to the position of the respondents in this case with reference to the Crown—a position which must be tested and judged of by the wording of the contract—you will be able to arrive at a conclusion one way or the other, whether the respondents were in fact and in law the servants and the agents of the Crown. If they were the servants and the agents of the Crown, acting on behalf of and for the use of the Crown, then it may be that they would have the privileges with reference to the patent which the case of *Feather v. The Queen* (') decided to remain in the Crown, even although there is nothing whatever in the contract expressly taking notice of those privileges, or authorizing the respondents to exercise them.

My Lords, I have used the words “servants or the agents of the Crown” for this reason. The case of *Feather v. The Queen* (') decided that although every grant of letters patent communicates in general terms to the patentee the right, and the sole right, to use and to exercise the invention, and prohibits other persons from using or exercising that invention, yet that a grant of that kind, being a Crown grant, must be construed with reference to those principles which regulate Crown grants, and that that which appears from its wording to be a general privilege and a general prohibition must be read with an exception in favor of the Crown itself; and inasmuch as an exception in favor of the Crown itself cannot be a personal exception, for the Crown itself could not exercise patent rights, the exception must be not only in favor of the Crown, but in favor also of those who act on behalf of, and as the agents of, the Crown. I, therefore, in the course of the argument, took the liberty of proposing to the Solicitor-General the insertion of words in the letters patent which would indicate the decision of the court in the case of *Feather v. The Queen* ('); and, with the exception of one word which the Solicitor-General proposed to add, I did not find that he took any exception or made any objection to the words which I proposed to insert. I propose to read, my Lords, and I submit to your Lordships that it is the proper course that we should read, [642] the grant of the letters patent as a grant by the *Crown to the patentee of a “license, full power, sole privilege and authority that he” the patentee, “his executors, administrators and assigns, and every of them, by himself and

(') 6 B. & S. 237; 35 L. J. (Q.B.), 200.

themselves, or by his and their deputy or deputies, servants or agents, or such others as he" the patentee, "his executors, administrators or assigns, shall at any time agree with, and no others." I propose there to insert these words, "excepting officers, agents and servants of the Crown, acting on behalf of and for the use of the Crown" "from time to time, and at all times hereafter, for the term of years herein expressed, shall and lawfully may make, use, exercise and vend the said invention within our United Kingdom," &c. My Lords, I say I did not understand the Solicitor-General to object to the words which I proposed to insert, except that he added to the words which I have proposed the word "agents," I having used simply the words "officers and servants of the Crown."

My Lords, the question then is, if that be the effect of the grant of the letters patent, if the grant is such that the sole privilege is communicated to the patentee and to those whom he may license, but that there is still engrafted upon that an exception which would authorize the Crown to use the invention, and would authorize an agent, an officer, or a servant of the Crown, acting on behalf of and for the use of the Crown, to use the invention, is it the case that the respondents in the appeal before your Lordships fill the position of officers, agents or servants of the Crown, acting on behalf of and for the use of the Crown? Now, my Lords, in order to answer that question you must turn to the contract itself. The Crown was desirous of being supplied with 13,875 rifles, and a tender was issued which appears to have been circulated among the different companies and manufacturers who might be likely to supply these arms, and, among the rest, one of these tenders was sent to the respondents, who constitute the London Small Arms Company. The tender contains in the first place the terms and conditions of the contract. The first clause is: "The articles required are to be of the qualities and sorts described, and equal in all respects to the patterns or samples and specifications, which may be inspected on application, as herein directed; and to be delivered by the contractor at his own *expense, in the time or times specified, [643 into the charge of the officer at the station named, accompanied by an invoice in duplicate, and no article that is rejected under section 2 shall be considered as having been delivered under the contract." The second clause is, "Previous to the articles being received into store, they will be examined by the officer or officers appointed for that service, and if found inferior or defective in quality they will

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be rejected, and the contractor is to remove the same at his own expense within ten days after he is required so to do, without any allowance being made to him for such rejected articles." I pass over the clauses until I come to the 7th, which is in these words: "Should the articles, or any portion thereof, not be supplied within the period or periods stipulated for the delivery, a fine of 2½ per cent. on the value of the articles deficient will be levied upon the contractor, and which fine may be deducted from any sums due to the contractor under this or any other contract, or demanded of him to be paid within fourteen days to the Paymaster-General, to the credit of the War Office; and in addition thereto the Secretary of State for War shall be at liberty to purchase the supplies from other persons, and to charge the difference between the price paid for the same and the contract prices to the contractor, and which difference shall be deducted and paid in like manner as the fines hereinbefore mentioned, and farther, the Secretary of State for War shall be at liberty, if he think fit so to do, to terminate the contract at or after any one of the specified periods at which default shall have been made either wholly or to the extent of such default." Then, my Lords, there follow the details of the articles to be supplied, which are stated to be "13,875 rifles, Martini-Henry, without sword-bayonets or scabbards, at £3 10s. (say seventy shillings) each, less 7s. 6d. each for steel tube, and 2s. 2d. each for stock. Patterns and specifications to be seen at the Royal Small Arms Factory, Enfield. Materials for barrels and stocks will be issued from the government stores. The viewing as required by specification during the process of manufacture will take place at Old Ford, Bow, E."

To that, my Lords, must be added what is not printed in the case, but was produced by the parties before your Lordships as being referred to in the tender, namely, the specification [644] of these *rifles. It is headed, "Specification and course of view to govern the supply by contract of interchangeable Martini-Henry rifles without sword or common bayonet. The following articles will be issued from the government stores to the contractors, viz., steel tubes for the barrels, stocks in the rough. In case of either of these articles being injured, during manufacture, by the contractor, they will be replaced from the government stores, and charged to the contractor. The coil mainspring will be supplied by the Small Arms department, and inserted in the action when being viewed for assembling and pull-off by the 'viewer.' All the other articles comprising the arm will

be provided by the contractor, and in accordance with the following list, which also shows the material they are to be made of." I pass over the list, and I pass over the "course of viewing including proof," which is applicable to the barrels, and does not concern the present question. At page 4 there is a provision for viewing the action of the breech, and then finally, at page 5, there is a clause headed "arm assembled." "The arm will be brought in for view assembled complete with all the parts finished."

Therefore, my Lords, in substance the result of the whole is this; what I may call the raw material for the barrel, the steel tube, is supplied by the government at a certain price; the butt or stock of the rifle is supplied by the government at a certain price; all the other component parts of the arm have to be provided or made (for the contract is consistent with either view) by the contractors. The whole component parts have to be inspected from time to time by the officers of the government. They have the right from time to time to reject any part of the arm while in the course of manufacture which is not consistent with the contract and the specification; and when the whole is, to use the technical term, "assembled," when all the pieces of the arm are put together, then if it complies with the specification, and in that case only, it is to be taken over and accepted by the government, and the property in it is to pass to the government, and, on the other hand, the price is to be paid for the article to the contractors.

My Lords, the question then has to be asked: During this process, what is the position of the person who is called the contractor? He is clearly not a servant of the Crown. That was not *contended. There is no contract of [645 service whatever between him and the Crown. He is not an officer of the Crown engaged in the service of the Crown. Is he, then, an agent of the Crown? My Lords, I cannot find any ground whatever for contending that the contractor is an agent of the Crown. He is a person who is a tradesman, and not the less a tradesman because he is engaged in works of a very large and extensive character; he is a tradesman manufacturing certain goods for the purpose of supplying them according to a certain standard which is laid before him as a condition on which the goods will be accepted. During the time of the manufacture the property, at all events, in that which concerns the present case, namely, the property in the lock, or the breech-action of the rifle, is not the property of the Crown. The materials are not the materials of the Crown. If the respondents make

the lock themselves the materials are provided by the respondents, and the respondents work upon those materials, not as the agents of the Crown, but as conducting their own work and their own manufacture for the purpose of supplying the complete arm.

My Lords, I can find here no delegation of authority—no mandate from a principal to an agent; I find here simply the ordinary case of a person who has undertaken to supply manufactured goods, who has not got the goods ready manufactured to be supplied, who has to make and produce the goods in order to execute the order which he has received. I find him engaged in that work on his own account up to the time when the article is completed and handed over to, and accepted by, the person who has given the order. I therefore arrive at the conclusion that there is not here on the part of the respondents that which amounts in any way to the character or the *status* of an agent, a servant, or an officer of the Crown. If so, the respondents are not within the exception which the case of *Feather v. The Queen* (') decided to exist in letters patent; and, if they are not within that exception, it appears to me that the other question becomes quite unimportant; for if not within the exception, it would be impossible that the Crown could communicate to them a privilege which was only a privilege attaching upon the Crown itself, and upon those who might be the agents, servants, or officers of the Crown.

646] *My Lords, that is the whole of this case. It appears to me, with great respect for the Court of Appeal, that the decision of the Court of Queen's Bench, a unanimous decision, and a decision pronounced by judges of whom two at least took part in the decision of the case of *Feather v. The Queen* ('), was an entirely correct decision. Speaking with great respect of the very learned persons who composed the Court of Appeal, and who also were unanimous, I am bound to advise your Lordships that the decision of the Court of Queen's Bench ought to be restored, and that of the Court of Appeal reversed.

My Lords, I apprehend that your Lordships will think it right, if you reverse the decision, to reverse it in a way which will carry to the successful party the costs in the Court of Queen's Bench and the Court of Appeal.

LORD HATHERLEY: My Lords, I have arrived at the same conclusion upon a consideration of the few facts which are important, as it appears to me, for your Lordships' deliberation in this case.

(') 6 B. & S., 257; 35 L. J. (Q.B.), 200.

In the first place I will direct my attention to that which I conceive to be settled in the case of *Feather v. The Queen* ('), as far as that case went. I take it to be there settled that, notwithstanding letters patent having been granted to a subject, giving him the sole and exclusive right of manufacturing and vending a patented article, and notwithstanding those letters patent being still current, it is competent to the Crown to manufacture those articles through the medium of its officers, its servants, or its special agents if you will, appointed for that purpose. The decision in that case went no farther than that. Then turning one's attention to the few facts, as I have said, which exist in this case, it appears to me that we have a contract entered into on the part of the respondents with the Crown, which contract I will very briefly consider presently; and we have to ask ourselves whether anything can be found within that contract to induce your Lordships to say that the respondents, by virtue of that contract, fill the position of being either servants or agents to the Crown in the manufacture of the article which they undertook to supply.

*Now there are two very well-known modes of [647 arriving at the possession of a manufactured article of which you desire to have the use—the two modes recognized both in private life, and in public engagements, and which are in themselves clear, distinct, and separate in every way; although, when you come to reason upon cases put hypothetically before you for consideration, you may find in some cases that the boundary line between that which is manufactured by what I may term home manufacture, and that which is bought under a contract such as we have here, may be fine—I do not think in the present case such a difficulty exists. But, taking an illustration from the very same character of case as that before us, I can explain very readily what I meant to convey by the observations I have just made. The Crown possesses dockyards in which vessels are built—it possesses divers manufactories in its public arsenals which are put in use by the Crown by means of its servants and agents. There is, I think, at Plymouth, a large biscuit manufactory, through the medium of which all the biscuit for the navy is or used to be (I do not know whether it is now or not) manufactured avowedly by the Crown; and in those numerous cases which occurred some few years ago upon Bovill's patent with regard to the grinding of corn, reference was made to the use of his apparatus in the Royal Biscuit Manufactory. I take it that the Crown

through its servants and its agents would be at perfect liberty under *Feather v. The Queen* (¹), acting in its own factory, to carry on that manufacture without paying any royalty, except as a manner of bounty on the part of the Crown, to the patentee of the machinery which was employed in such a work. So, again, whilst building their ships in their naval arsenals, the Crown and its officers would be entitled to make use of the very largely multiplied patent inventions which exist with reference to the construction of a ship, without paying, except as I have said by way of bounty, any premium to the patentee for the use of any invention or any article which has been patented.

But then one has to ask whether, in the documents which we find before us, there is anything at all approaching to this. Now I apprehend, my Lords, that when you speak of a home manufacture, and a manufacture through the 648] medium of servants and *agents of your own, you ordinarily mean, although in some cases some elements may be wanting, and in others, others—that there is a plant—that you have an establishment—that you either have in your own possession or have acquired by purchase the article upon which you are to operate in bringing your manufacture to perfection—and, having done all that, you proceed to manufacture as you think fit, at your own time and in your own manner, stopping the manufacture when you think fit so to do, and retaining the control over it in your own hands. I do not think that that would be interfered with because you might give out one or two portions of it to be manufactured by piece-work, if you think fit to do so. But how different is that from the contract which you enter into when you go out into the open market and purchase an article. For instance if, for some reason or other, the Crown should cease to manufacture its own biscuit, and should apply to the large contractors who contract for the supply of articles of this description—provision contractors and the like—and offer to them contracts to be tendered for and say: We give up our plant, we give up the persons who have been engaged in our service, the persons who have been employed in carrying on this work, we think it beneficial to the public that we should become purchasers, instead of manufacturers of this article.

My Lords, it appears to me that that is the simple thing that has occurred here. I am stopped from considering all the nice distinctions which might be made in the case of a contract in such a form, or in such another form, and the

(¹) 6 B. & S. 237; 35 L. J. (Q.B.) 200.

like; and I ask myself, What is the contract we have here? Now the first observation I make upon it is this: there is a printed document which is issued, and which is, obviously, from its printed form, and from what you there find, intended to be a form for inviting tenders for every description of supply that the government may think fit to require tenders for. The first document,—that document which is dated “War Office”—is to invite tenders for rifles, and it has the word “rifles” introduced into it. It might have been for biscuits; it might have been for anchors, patented in a certain manner, or otherwise; but it happens to be for rifles. There is no reference in that document whatever to patents. This being, as I have observed, a printed document, it has no reference at all to patents *or to dealing with patents in regard [649 to the articles which were to be supplied under the contract. If there was any intention of handing over an authority on the part of the Crown, if the Crown conceived that it had such a right, which I, for one, am not satisfied could in any way be established—if there was any intention of handing over, with the contract, by others, to supply what the Crown did not think it convenient to manufacture for itself, the power and authority to the contractors of providing themselves with patented articles for that purpose without obtaining a license from the patentee, or without purchasing them from the patentee—I apprehend that if that idea had crossed anybody’s mind in framing this invitation to tender, we should have found some reference to patents in it, whereas we find none; we find only a contract to deliver a certain article patented or unpatented.

After that comes the tender, exactly in the same form; and then after that the specification. I do not intend to occupy your Lordships’ time at any length upon this subject, especially after it has been so fully discussed, as it has been, by the noble and learned Lord on the woolsack, who has preceded me; but I can find nothing in any portion of the specification which leads me, at any rate, to the conclusion that the Crown intended that this supply should be different from any other supply which a person or a company may desire to have when he is going to do any work upon a large scale—anything which can make this, in fact, different from many cases that were suggested in the course of the argument. One of those cases, which was suggested at first by my noble and learned friend on the woolsack, was the case of a contract with a builder to build you a house. You might say,—I wish to have a house built, and I give you a certain specification upon the subject on which

your contract is to be framed. I intend to have the different things which are of principal importance in the house provided for in a certain fashion. And, just as this contract which we have before us provides in the specification for a pattern gun, which, I assume, includes the breech-action, for which the appellant has a patent by purchase from the patentee; so in the same way, I suppose, the specification for a house would indicate that the windows were to be of a certain pattern, with reference to the glass or the fixing of 650] them, and that the cowls of the chimneys *were to be of a certain patented form. How would that contract be construed by any court whatsoever? It would be held that the contractor was bound to acquire those windows and those cowls, and to acquire them, like everything else that he acquired, of course lawfully and not unlawfully.

That, my Lords, is all that the contract amounts to here. Here, on the one hand, the officers of the government say: We do not intend to do home manufacture; we have home manufactories, but we do not intend to use them for this purpose; we have home manufactories for cannons, provisions, biscuits, and the like, but we do not intend to carry on these home manufactures at all; we intend to purchase these articles, and to obtain a tender of the prices at which they are to be supplied. We have furnished a pattern, which is to be followed, and that pattern, as it happens, involves a patent breech to the gun, which is to be furnished. The contractor says: I undertake to furnish you with all this; and he being a contractor who is furnishing for a given price, for a profit to himself, not, as it appears to me, in any sense in which the word can be used, as an agent for the Crown, but simply as engaging to sell to the Crown, to supply to the Crown, this article in this form; he is undertaking to do all that. Of course if a patented portion comes in his way in the pattern gun which has been furnished to him, that patented article he must provide in a lawful manner. I cannot understand in the least that he is placed in any position of difficulty whatever. Several possible positions of difficulty were suggested; but if he did make the complaint, and made it with any justice, that he could not obtain the articles of a patented character, I apprehend the answer of the Crown would be: We told you that you might look at the pattern—at the specification of the article you were to furnish—before you made your tender. You made your tender. We presume you considered all these things beforehand. If you have not done so, it is your fault; it is no fault at all of those who entered into the con-

tract with you. Under these circumstances I cannot understand how this contract can be said to be anything else than a contract of those who have tendered, and who are acting as contractors for the sale of an article they have manufactured, just like any other articles they are in the habit of manufacturing; and I think that *the privilege [651] which would have attached to the Crown for its own manufacture cannot be considered to attach to a person who, on his own behalf, enters into this contract, and undertakes to supply the Crown with these articles.

For these simple reasons, my Lords, it appears to me that this case becomes, when it is thoroughly sifted, sufficiently plain in its result, although undoubtedly one ought to speak with some hesitation upon the subject when one sees the unanimity which prevailed in the court from which the appeal is brought. But, on the other hand, one must set off against that the unanimity which existed in the court whose original judgment was reversed on that occasion.

LORD PENZANCE: My Lords, I am very glad that this case should have received so full and so very elaborate an argument, not only on account of the importance of the case, and the principles involved in it; but because I think the result of that argument has been to show that the real point upon which the case turns is narrowed to a very small one.

My Lords, I conceive that the real question in this case is simply this, whether under the circumstances the contract which was made between the respondents and the government was a contract of agency or a contract of sale; and I conceive that the argument on the part of the respondents that it was a contract of agency, rests upon the general proposition that in all cases where an individual, bargaining, contracts to sell a completed article, which is to be manufactured according to the special directions of the purchaser, he is, while in the course of manufacturing that completed article, the agent of the purchaser. It seems to me that it is impossible for the respondents' argument, as presented at the bar of your Lordships' House, to be correct unless it goes that length. It must go the length of asserting that where an article required specially to be made is ordered of a tradesman, subject to a condition and bargain on the part of the orderer that he will accept the article when made, if satisfactory and if in accordance with his order, the tradesman while in the course of making the article is throughout acting as the agent of the purchaser.

*Now, my Lords, I say it is necessary to go that [652] length, because in the present case the basis of the whole

argument is the case of *Feather v. The Queen* (¹), in which it was decided that although a patent created a monopoly as against all the Queen's subjects in the patentee, yet it reserved to the Crown the use of the invention without regard to the patentee's rights. That is the basis of the argument, and in order to carry the argument forward it is necessary to make out that in this case the Crown has used the invention. We all know that the Crown is an abstraction, and that the Queen individually could not use the invention. Therefore, if there has been a use of the invention by the Crown it could only be by the Crown's agents; and so it is that the argument comes round to the point, whether upon a contract which no one will deny to be, upon the face of it, a contract of sale, there is a contract of agency during the carrying out of the work—a contract of agency which when completed must end in a sale of the property in the completed thing, and a passing over of it to the purchaser.

Now, I will not trouble your Lordships' by reading again the contract which my noble and learned friend on the wool-sack has read in detail; but it is obvious from the terms of it that it is a contract for the supply of certain articles to be delivered in certain quantities, at certain times. It is also obvious that the articles are not to be received unless they come up, in the opinion of the Crown officers who are to inspect them, to the sample and the specification according to which they were to be made. The contract itself contains of course a reference to the specification; and it has been argued that that specification in some respect alters the character of the contract. Now, in this specification I can find nothing but this—certainly the language used in the specification seems to contemplate that the arm as a completed article is to be manufactured at the premises of the respondents, because in the tender which the respondents made I find that under the heading of the place where the viewing is to take place during the process of manufacture, they put the address of "Old Ford, Bow." Again, I find that the arms are to be taken over by the Royal Small Arms Factory superintendent, at the company's manufacture [653] tory at Old *Ford. Then, again, in the specification I find the manufacture by the respondents in so many terms, spoken of thus: "A standard working pattern arm, with the standard jugs and gauges, will be kept at the inspection department for reference, and to enable the contractors to make similar gauges for guiding their manufacture according to

(¹) 6 B. & S. 257; 35 L. J. (Q.B.), 200.

the specification." Therefore, I think, it is a fair result of this specification, coupled with the words of the tender which was put out by the government, that the respondents were to manufacture the article as a complete article. But it is impossible, I think, to say upon the face of either the contract or the specification that they were bound to make every individual part of it. It is impossible to say that they would not have fulfilled their contract if in the course of manufacturing the entire arm they had introduced parts which had been made by other people or came from other sources.

That, my Lords, being the state of the contract, the question which occurs is, whether there is anything in that contract to turn it into a contract of agency. Now, my Lords, in asking that question several tests have occurred to my mind which might throw some light upon the subject. First, could the respondents, if a foreign government had wanted a thousand of these breech-actions, have sold a thousand of those breech-actions which were in the course of being made at their factory? And if they had sold them, and if nevertheless they had supplied the British government with the requisite and agreed quantity of arms at the agreed times, would Her Majesty's government have had any cause of action against them? If they were making them as the agents of Her Majesty's government, as fast as every piece of work was put upon the material it would become the property of the government, the government would have an interest in it, and the respondents would not, as it appears to me, be able to sell or part with it to anybody else. But if they were only under a bargain to deliver a certain number of articles at a certain time, then, although in the first instance they may have intended certain portions of the work to be applied to the fulfilment of that contract, there might be nothing, if they were not agents, to prevent their parting with them to other people.

Then, again, could the Crown, which is looked upon according *to the argument as the employer, the au- [654
thority whose agents the respondents were,—could the Crown, while the work was going on, order the dismissal of a particular workman, or order any step to be taken which the officers of the Crown thought desirable? Could they give any special directions for doing the work in a special way, or was that entirely in the power of the respondents? If the respondents were their agents, doing their work under a contract of agency, it would seem to follow that the principal might withdraw any previous orders he had given,

and order that the thing should be done in a different way. Of course when the question of remuneration came to be considered, that might impose upon the employer some farther pecuniary liability; but, so to speak, he would be master of the work, and would be entitled to give such orders as he pleased while the work was going on.

Another test occurs to me. Suppose a fire had taken place at the factory while this work was being done, and some of these articles had been either injured or utterly destroyed, at whose risk would that have been? My Lords, there can be but one answer. I speak only of the breech-action. I pass by those portions of the work which were provided by the Crown. With regard to the breech-action, those things upon which the respondents had been doing work, with a view to complete this contract ultimately, by presenting a complete arm, there can be no doubt that any loss which happened by fire to those portions of the work would fall upon the respondents themselves.

Then, again, as to the rate at which the work should proceed; provided they complied with the contract, by delivering the requisite quantity of arms at the given time, the government would not have had the ordinary power which an employer has of either accelerating or retarding the rate at which the work was to proceed.

My Lords, all these may be trifling matters, but they are all incidents which appear to me to belong to a contract of agency, as distinguished from a contract of sale. I think the true distinction in this case is between an authority or mandate to do a thing for a money reward, in the doing of which, whether the individual is a servant or only a contractor, he is all along acting *as an agent*, and a contract for the supply and acceptance, if approved, when completed, of an article to be made by the contractor, in the making of which the contractor, though working under inspection, is *all along acting on his own behalf*, and at his own risk. I conceive that this latter description is a description which properly applies to the contract in this case, and consequently that the respondents never were the agents of the Crown, and therefore are unable to set up the immunity which the Crown enjoys.

My Lords, I wish to say one word upon another branch of the subject. Supposing it is said that the Crown has power to authorize an agent to do work for it which would otherwise be an infringement of a patent, must there or must there not be some authority beyond a mere authority to make the patented article? Must there or must there not

be some authority to make it without a license from the patentee? Now, I confess I incline to the opinion that Sir William Harcourt's argument upon that subject is well founded. This patent reserves, as patents generally do, always I believe now, a power in the Crown to demand of the patentee, the making of any quantity of the patented article the Crown may require, at reasonable prices. No doubt that means a price which will remunerate him as a patentee. On the other hand, the case of *Feather v. The Queen* (*), which we assume for this purpose to be good law, declares that the Crown may do it without giving any reward whatever. But I cannot help thinking that, whether the Crown should or should not, in any particular case, desire to take advantage of that immunity, must be a question upon which the Crown is-entitled to exercise its discretion, and therefore that any bare contract (supposing that this were one of that character, which I have already pointed out I do not think it is) with an agent to do the work, if the Crown says nothing to the effect that he is to do it without reference to a patentee's rights, will not be sufficient to show that the Crown was exercising such an election, and consequently the agent, without such express authority, would have no right to infringe the patent. My Lords, I say that with some hesitation, because my noble and learned friend on the woolsack appeared to think otherwise. It *is not perhaps material in this case, because all [656 your Lordships are I believe of opinion that on the main point the judgment of the court below must be reversed, and the judgment of the Court of Queen's Bench restored.

LORD O'HAGAN: My Lords, this case has been narrowed so much and discussed so thoroughly that, but for its general importance and the singular conflict of judicial opinion upon it, I should have declined to add anything to the observations of my noble and learned friends. I shall state, in the briefest terms, the grounds of my agreement with them.

I am strongly of opinion, with the learned judges whose decision in *Feather v. The Queen* (†) is the subject of our present consideration, that it is not desirable to extend the principle established by that case (*). I do not think that it should be extended for any of the reasons which have been suggested to your Lordships: and it seems to me that the ruling of the Court of Appeal, if adopted by this House, would involve such an extension, with very serious consequences.

(†) 6 B. & S., 257; 35 L. J. (Q.B.), 200. (*) See Law Rep., 10 Q. B., at pp. 136-138.

In *Feather v. The Queen* ⁽¹⁾ the contention was between the Crown and the patentee. Here it is between two subjects, one of whom complains of the other as having infringed on his undoubted right; and unless in the doing of the thing complained of the Crown was really the actor, and the respondent its mere servant or agent, obeying its express command for its sole use and benefit, the invasion of the patent was unwarranted, and the appellant must prevail.

But for the opinions which have been expressed the other way, I should hold it clear that the respondents were not the servants or the agents of the Crown, so as to obtain, for an admitted infringement, the immunity which the law, as it stands, must be taken to afford to the Crown. They were not servants or agents for that purpose, acting under a master's control, dealing with a master's property, and attending merely to a master's interests. They were contractors 657] making a specific bargain for *their own profit; and securing that profit by operating on property of their own. They entered freely into a contract "to provide and deliver" the articles specified in it. During the preparation of those articles, the property with which they dealt continued to be their own, save, perhaps, so far as the materials to be manufactured were supplied to them. Until the contract was complete, they used that property as they pleased, on their responsibility and at their own risk; and it was in the power of the Crown to reject their work at any time before the completion and delivery of it. I think it impossible to say that, in such circumstances, the incidents of the relation of master and servant, or superior and agent, attached as between the contractors and the Crown.

It has been urged that the contract was to "make" or "manufacture" the rifles. I find nothing in its terms, or in the specification or the schedules, to necessitate any such construction of it. As I have said, the contractors' undertaking is "provide and deliver," and the specification begins by the consistent use of the word "supply." I conceive that the exigency of that undertaking would have been answered if, manufacturing the materials supplied by the Crown, they had supplemented them and finished the arms by other materials, including the patented article, however and from whomsoever they might have been procured. The contract was not of service but of sale, for the contractors' own benefit, of certain commodities, fulfilling certain conditions, and to be paid for on certain terms; and if those

(1) 6 B. & S., 257; 35 L. J. (Q.B.), 200.

conditions were fulfilled, whether by their own workmanship or articles provided at their instance, I apprehend the Crown could not have rejected the commodities; as, on the other hand, its rights of rejection on non-fulfilment until the moment of delivery remained intact, a state of things difficult to be reconciled with the theory of agency or service.

The exact position of the parties, in this regard, seems to me to have been somewhat misconceived by the learned judges of the Court of Appeal when they described the Crown as "supplying the materials and simply ordering the manufacture of an unmanufactured article." If this had been so; if all the materials had been supplied by the Crown to its own hired servants, acting in its own premises, exercising no discretion, and having no *property, but [658 merely carrying its orders into effect, the cases cited as to the liabilities of principals might have application, and the Crown might have been regarded as itself the manufacturer and protected by the implied exception of the patent. But the facts appear to me to be otherwise, as I have indicated already, and I agree with Mr. Justice Archibald (') that "the contract might have been performed by supplying articles manufactured long before the date of the contract. The rifles were to be furnished by sub-contractors, and it was not a case in which the Crown was manufacturing itself."

Then it was competent for the contractor to have fulfilled his agreement to the letter by paying for the license of the patentee; and the contract does not, on any construction of it, expressly or implicitly declare that the Crown designed or directed the dispensing with that license. The order "to provide and deliver" involved neither requirement nor approval of illegality, and cannot be assumed to have been issued with the desire that the contractor should act without the permission of the patentee, and therefore, so far as he was concerned, in fraud of individual right and in contravention of the law. Surely, the contrary assumption, if any, should be made. If the work could be done in one of two ways—legally or otherwise—ought we to suppose that the legal mode was not contemplated, in the absence of clear words forbidding it? But there are no such words. There is not in this case any protective or fortifying order of the Crown, if any order could have been so, by which one subject can shield himself from the consequences of his invasion of another's right; and, on this ground Sir W.

(') Law Rep., 10 Q. B., 138.

Harcourt's argument appears to me unanswered and sufficient.

As to the reasoning based on considerations of policy, I shall only say that it cuts both ways. The Crown appears to me to have guarded the public interests, by the frame of the patent, with abundant care. It secures the service of the patentee on terms dictated by itself, and with penal consequences of a grave character if that service be not fitly rendered; and it has power, if necessary, to increase the stringency of the conditions of its grants. But, on the other 659] hand, policy and justice seem equally to demand *that we should not be persuaded lightly to adopt a view derogating largely from the rights which a patentee has purchased by his genius, his labor, and, it may be, his fortune, and which are vested in him for the interests of society more than for his own. At the very least, a royal order, relied upon as authorizing injurious interference with profits which are solemnly secured to him by royal grant, should be clear and unequivocal if it is to be effective: and no such order, as I have said, has been proved in this case. The argument from policy does not, therefore, help the respondents.

With very sincere deference for the Court of Appeal, and such distrust of my own judgment as that deference suggests, I am obliged to concur in the reversal proposed to your Lordships.

LORD SELBORNE: My Lords, I agree with the opinions which have already been expressed.

I consider the case of *Feather v. The Queen* (1) to have determined that letters patent for inventions operate to grant an exclusive privilege to the patentee against all the subjects of the Crown; and that the Crown is not bound by them, not (strictly speaking) because it is impliedly excepted, but because the privilege granted is a privilege against the subjects only, and not a privilege against the Crown. But, for the purpose of testing, in this or in any other case, the consequences of that decision, I see no reason to object to the manner in which it was put by my noble and learned friend on the woolsack, viz., as if the sovereign, and the officers, agents, and servants of the sovereign, had been expressly excepted from the operation of the grant.

I agree with the Court of Queen's Bench that this decision is not to be extended by any reasoning from the convenience of the Crown or of the public service, or from any idea that it practically comes to the same thing, whether the

(1) 6 B. & S., 257; 35 L. J. (Q.B.), 200.

Crown manufactures itself or gives orders to other manufacturers. It cannot, on any such grounds, be extended so as to make the grant less operative than, according to its proper construction, it purports to be, against the subjects *of the Crown. It would be inconsistent with the [660 grant to hold that the exemption of the Crown from this privilege can be imparted to a subject, whether it might or might not be convenient to the public service, in any particular case, that this should be done.

The case, therefore, in my opinion, depends upon the question whether the relation of master and servant, or of principal and agent, existed between the Crown and these respondents, during the process of the manufacture of the breech-action in question, and for the purposes of that manufacture; and this question must, in my opinion, be decided by a strict and accurate application of legal principles to this particular contract, exactly in the same manner as if any private person, and not a public department, had contracted with the respondents, in the terms of the documents before us, for the supply of these arms.

I cannot doubt as to the answer to be given to the question when that test is applied. There was clearly no contract of hiring and service, and I am equally clear that any private persons who entered into such a contract, would not have been liable for the acts of the defendants during the process of manufacture, as a principal is liable for the acts of his agent. It is not like the case of a railway contractor who executes works which the company itself is bound by law to execute, and which only can be executed by the directors, or by some person acting by their authority, and entitled on their behalf to exercise the powers vested in them by the Legislature. Nor is it like the case of a direct order to a contractor to do an unlawful act, to the injury of another person. Here there is no order to infringe any patent; and it cannot be inferred that this would have been intended or authorized by a private person entering into this contract, the use of patented articles or patented processes being, in the ordinary course of business, a thing which may be lawfully obtained in the proper market, just as any necessary materials might be, which the manufacturer, taking the contract, might not himself have in stock.

Judgment of Court of Appeal reversed, and judgment of the Court of Queen's Bench restored.

*Sir William Harcourt: My Lords, I do not [661 know upon the question of costs what form of order should

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be made in your Lordships' House. The court below gave costs against us, both the costs in the appellate court and in the Court of Queen's Bench, and I should imagine that the natural result of your Lordships' judgment would be that we should have the costs of this appeal and all the costs below.

LORD HATHERLEY: As regards the costs in the Court of Queen's Bench the judgment of that court is restored by our order, and the judgment of the Court of Appeal below is reversed; therefore, all that was ordered by the Court of Appeal is gone. No costs are given of the appeal to this House.

Sir *William Harcourt*: Do I understand your Lordships to say that, according to a rule in this House, no costs are given of the appeal to this House?

LORD HATHERLEY: That is the decision of the House.

Lords' Journals, 11th July, 1876.

Solicitors for the appellant: *Stibbard & Cronshey*.

Solicitor for the respondent: *J. Clulow*.

While this case is undoubtedly correctly decided under the fundamental law of England, and is extremely valuable as a lucid explanation of the right of sovereignty, the mere rule of law laid down as to the right of the sovereign to manufacture a patented article probably would not apply here. The constitutions of the United States and of the various states forbid the taking of private property for public use without just compensation: 2 Kent's Com. (12th ed.), 338, 340; Const. U. S., 5th amendment; Const. N. Y., art. 1, §§ 6, 7; 2 Story on Const., § 1790; Paschal's Annotated Const. (2d ed.), 261.

It is not easy to see why the inventor, after patent, has not a property in his invention. It would seem, how-

ever, that after he has made his invention public, independent of a protection from the government under its letters patent, any one could manufacture the article patented: *Palmer v. Dewitt*, 47 N. Y., 532, 536-544; *Wall v. Gordon*, 12 Abb., N.S., 349; *Oertel v. Jacoby*, 44 How. Pr., 179.

The principal case went upon the ground that the sovereign, in issuing letters patent, grants them as against the subject only, and not as against himself. If this be the true doctrine it is possible that the United States would have the right to manufacture an article patented by the inventor. In justice it ought not and probably would not do so without just compensation if the inventor were disposed to deal fairly with it.

[1 Appeal Cases, 662.]

H.L. (E.), July 3, 4, 5, 27, 1876.

[HOUSE OF LORDS.]

***WILLIAM LYON, Appellant; and THE WARDENS, [662
&c., OF THE FISHMONGERS' COMPANY AND THE CONSER-
VATORS OF THE RIVER THAMES, Respondents (').**

Thames Conservancy Act (20 & 21 Vict. c. cxlvii)—Riparian Proprietor.

By the Thames Conservancy Act (20 & 21 Vict. c. cxlvii), s. liii, the Conservators appointed under that act have a power to grant a license to a riparian proprietor to make an embankment in front of his own land abutting on the river, but though such license might be the owner's justification so far as the public right of navigation was concerned, it would not authorize a licensee, being a riparian owner, to embank in front of his own land so as injuriously to affect the land of another riparian owner.

The right of navigating a tidal river is common to the subjects of the realm, but it may be connected with a right to the exclusive access to particular land on the bank of the river, and the latter is a private right to the enjoyment of the land, the invasion of which may form the ground for an action for damages, or for an injunction. It comes therefore within the operation of the saving clause (sect. clxxix) of the Thames Conservancy Act.

The right of a riparian owner to the use of the stream does not depend on the ownership of the soil of the stream.

The power granted to the Conservators under the 53d section of the 20 & 21 Vict. c. cxlvii, is qualified and restricted by the provisions of the 179th section.

THIS was an appeal against a decision of the Lords Justices which had (except as to one point, upon costs) reversed a previous decision of Vice-Chancellor Malins.

The appellant was the owner of certain freehold land and buildings on the north bank of the Thames, known as Lyon's Wharf, the whole of the southern side of which fronted the river. At the western extremity of this frontage there was an inlet which extended about forty feet to the northward, and formed the western boundary of the appellant's property. At the bottom of this inlet stood a wharf belonging to the Fishmonger's Company, commonly known as Winckworth's Wharf. The water of this inlet, bounding the appellant's property to the west, and running up to the main river on the south, was called Winck- [663
worth's Hole. This inlet extended westward in front of the property belonging to the Fishmongers' Company, to a place called Broken Wharf, and thus the appellant's property enjoyed the advantage of a double river frontage; to the south, on the main line of the river, to the west, on Winckworth's Hole, at the side. It was alleged that for an indefinite period of time both these means of communicating with the river had been enjoyed by the occupiers of

(') Reversing 14 Eng. Rep., 837.

Lyon's Wharf. On the west side there had been steps down to the water from a door, and there had been windows above the door, and there were piles in a line with the south front, behind which barges, conveying goods to the western side of the appellant's warehouse, could be conveniently and safely moored. All these advantages had been in constant use by the appellant's tenants.

In the year 1857 an act called the Thames Conservancy Act was passed, by which a body called the Conservators of the Thames was constituted. The liii. section of that act was in these terms: "It shall be lawful for the Conservators to grant to the owner or occupier of any land fronting and immediately adjoining the river Thames, a license to make any dock, basin, jetty, wharf, quay or embankment, wall, or other work, immediately in front of his land, and into the body of the said river, upon payment of such fair and reasonable consideration as is by this act directed, and under and subject to such other conditions and restrictions as the Conservators shall think fit to impose." The act also contained a section (clxxix) for protecting private rights⁽¹⁾.

The Fishmonger's Company obtained in 1872, from the Conservators, upon a payment of £250, a license or permission to make an embankment in front of their wharf (Winckworth's Wharf) up to the main line of the river, 664] which would have the *effect of entirely displacing the water from Winckworth's Hole, and so putting an end to the use which had always been made of it by the occupants of the appellant's premises. On the embankment thus created, the Fishmonger's Company proposed to erect warehouses.

The appellant, to prevent this from being done, filed his bill in Chancery against the Conservators and the Fishmongers' Company, praying that the Fishmongers might be restrained by injunction from constructing these works, or doing anything whereby the appellant's right of access to the river on the west side of Lyon's Wharf, or the privilege theretofore enjoyed by him of laying and mooring craft, and loading and unloading goods, on the west side of Lyon's Wharf, directly from the river, might be defeated or

(1) Sect. clxxix: "None of the powers by this act conferred, or anything in this act contained, shall extend to take away, alter or abridge, any right, claim, privilege, franchise, exemption or immunity to which any owner or occupier of any lands, tenements, or hereditaments

on the banks of the river, including the banks thereof, or of any aits or islands in the river, are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect, as if this act had never been made."

prejudiced, and also from creating any obstructions so as to interfere with his right of access to the river as aforesaid. And also that the Conservators might be restrained from selling any part of the shore, or granting any license or authority to the Fishmongers' Company for the purposes aforesaid.

An interim injunction was granted—and the Fishmongers' Company put in an answer denying the right of the appellant to the use and enjoyment of free access to the river as alleged, and claiming for the company the exclusive right of user of the water in Winckworth's Hole—and the answer also alleged the license of the Conservators for what was proposed to be done.

The Conservators by their answer claimed the right to grant the license under the provisions of the Conservancy Act.

Evidence was taken on both sides. The motion for a decree came on before Vice-Chancellor Malins, in April, 1875, when the injunction prayed for was granted⁽¹⁾, the two sets of defendants being ordered, respectively, to pay the costs of the evidence filed on their own behalf.

The Fishmongers' Company appealed to the Lords Justices against this decree, which, on the 30th of July, 1875, was ordered to be reversed, and the bill, as against the Fishmongers' Company, to be dismissed with costs, except the costs occasioned by the claim of the Fishmongers' Company to the exclusive use of Winckworth's Hole⁽²⁾.

*Mr. Cotton, Q.C., and Mr. R. E. Webster, for the [665 appellant: Independently of any question on the construction of the Thames Conservancy Act, the decision of the Lords Justices cannot be supported on principle. It could not be disputed that the appellant was a riparian owner, yet the Lords Justices denied him, as a riparian owner on a tidal river, any rights with respect to the river which were not enjoyed by every individual who used the river for the purpose of navigation⁽³⁾. Such a holding was in direct negation to the law as laid down by this House in the case of *The Duke of Buccleuch v. The Metropolitan Board of Works*⁽⁴⁾.

A riparian owner has not only the right to the use of the water of a tidal river in the same way, and to the same extent, as any of the other subjects of the realm, but he has also special rights or easements connected with his land on the banks of the river. If those private rights were rendered

(1) Law Rep., 10 Ch. App., 681 n.

(2) Law Rep., 10 Ch. App., 679.

(3) Law Rep., 10 Ch. Ap., 689.

(4) Law Rep., 5 H. L., 418.

less valuable, the party prejudiced thereby had a right to compensation, although the work complained of might be done under the authority of an act of Parliament: *The Metropolitan Board of Works v. McCarthy* (*). That principle was acted upon in *Miner v. Gilmour* (*), and still more strongly in *Lord v. The Commissioners of Sydney* (*). In *The Attorney-General v. The Conservators of the Thames* (*), which was a proceeding on this act itself, the court distinguished between the rights possessed by a riparian owner and one who used the river solely for the purposes of navigation, and held the former to have a clear and established existence, and that the right of access to the land of the owner was a private right which came within the saving in the 179th section of the act, and only rejected the claim of the owner in that case, upon the ground that what was proposed to be done was not an interference with the private right of access, but only with the public right of navigation which the owner enjoyed in common with all the rest of the subjects. It had long ago been decided in *Rose v. Groves* (*) that a declaration disclosing an act of damage to a private owner on the banks of the Thames, by obstruct-
666] ing the access from the river to his house, *showed a good cause for a claim for compensation. In the *Eastern Counties Railway Company v. Dorling* (*) a private right in the owner of land upon the banks of a navigable river was also recognized, and an injury affecting it was held to be the subject of compensation. And in *Kearns v. The Cordwainers' Company* (*), though it was there held that the Conservators under this act of 1857 might license the erection of a landing platform, which was for the public benefit, and which was thought not to be really injurious to the plaintiff, the court expressly declined to say whether the Conservators had power to license such erection so as to interfere with the vested rights of individuals owning land along the shore. *Marshall v. The Ulleswater Steam Company* (*) in like manner recognized the private rights of an owner of land on the bank of a navigable lake, in addition to those which he enjoyed, in common with the rest of the public, to navigate the lake, and the only question there really related to a conflict between the private rights of two separate sets of persons.

The Thames Conservancy Act did not justify what had

(*) Law Rep., 7 H. L., 248.

(*) 12 Moo. P. C., 181.

(*) 12 Moo. P. C., 473.

(*) 1 H. & M., 1.

(*) 5 Man. & G., 613.

(*) 5 C. B. (N.S.), 821; 28 L. J. (C.P.), 202.

(*) 6 C. B. (N.S.), 338; 28 L. J. (C.P.), 285.

(*) Law Rep., 7 Q. B., 166.

been done here. It never was the intention of the Legislature to invade and destroy private rights. The object of the act was to improve the condition of the river and increase the facilities for its easy navigation. That certainly would not be effected by forcing persons who had hitherto enjoyed the use of creeks and inlets for mooring their barges, to moor them in the full course of the river. So far from any intention of this kind being entertained by the Legislature, the 179th section of the act was expressly directed to prevent existing rights from being invaded.

The *Solicitor-General* (Sir *H. Giffard*), and Mr. *Glasse*, Q.C. (Mr. *Chitty*, Q.C., and Mr. *Dundas Gardiner* were with them), for the respondents: The question, what is the public interest in this matter, has not been properly considered, yet that forms the justification for the grant of this license. The river banks had required to be improved, and this act was passed to facilitate that improvement. The *Crown had consented, for this public purpose, to [667 vest its own rights in the Conservators appointed under the act, and the mayor and citizens of London had done the same. Sects. 50 and 52 expressed this in the clearest manner. When this was done for a great public purpose it was not to be supposed that a small claim of private convenience was intended to be preserved so as to prevent a public improvement. The 179th section had no such purpose in view, and was, therefore, inapplicable to the present case. It was the imperfect condition of the river which had led to the use of Winckworth's Hole in a way now claimed by the appellant as a matter of right. The object of the 53d section was to enable the Conservators of the river to improve it by grants of licenses to individual owners of frontages along it, to form piers, jetties, or "embankments," that word being expressly used in the statute, and the security for the rights of individuals was sufficiently provided for by the necessity of appealing to the Conservators for a license to do what was required; and it must be assumed that the discretion thus vested in the Conservators would not be abused. The court proceeded upon that principle in *Kearns v. The Cordwainers' Company*(¹), and even more strongly in *The Attorney-General v. The Conservators of the Thames*(²), declaring that it would not assume that a duty imposed on the Conservators would be neglected, and that it could not interfere on a mere question of inconvenience. And with respect to the 179th section, though the court held that the access to a wharf, which was claimed in

(¹) 6 C. B. (N.S.), 388; 28 L. J. (C.P.), 285.

(²) 1 H. & M., 1.

that case, was a private right within the saving, yet that a pier which rendered the approach to the wharf less convenient, without rendering access impossible, was an interference, not with the private right of access, but with the public right of navigation, enjoyed by the wharf owner in common with the rest of the public, and that such right was not among those comprised in the statutory saving. That decision really disposed of the present case.

The right now contended for is not that of a riparian proprietor. That riparian right, so far as the appellant is concerned, is that of access from the south front of his wharf to the river, and that access is not, and never has been proposed to be, interfered with. *The appellant has still perfectly free access to the river, but he claims, without reference to anything but his own convenience, to have the power of mooring his barges by the side of his warehouse, to have, in fact, a double frontage to the river. If that occasions an inconvenience to the common use of the river by the public, that is one of the very matters which the statute designed to remedy.

The 179th section was intended to protect proprietary rights long established, and incapable of being interfered with without serious injury to individuals. That was not the case here. If the south frontage had been interfered with there would have been an injury, and the appellant would have had a ground of complaint. That had not been done, and the interference with the use of the water on the west side was no substantial injury of which he could complain. The cases relating to the Thames Embankment Act, *The Duke of Buccleuch v. The Metropolitan Board of Works*⁽¹⁾ and *The Metropolitan Board of Works v. McCarthy*⁽²⁾ do not apply to the present. The statutes to which they related were worded differently, and contained distinct provisions by which compensation was given in certain cases, and the only question that could be raised was, whether the claims from time to time put forward came within those provisions. And there the right which was to found a claim for compensation was required to be clearly existing private right. There was no such private right here. The appellant could do all that he required by using the proper front of his warehouse. He had a right to access to that front, but he had no other private right, and that one was not affected. The right of free navigation was one he enjoyed in common with the rest of the world, and which could not form the ground for a private action, and that

⁽¹⁾ Law Rep., 5 H. L., 418.

⁽²⁾ Law Rep., 7 H. L., 243.

right had in truth never been interfered with. He had no special right of access by the side of his warehouse. [LORD SELBORNE: All the authorities describe the right of a riparian owner in general terms, and do not draw the sort of distinction now suggested.] But there must be some distinction—there may be special rights, and there may be others which are only enjoyed in common with the rest of the subjects. The case of *Marshall v. Ullswater Steam Company* ⁽¹⁾ was one of that sort where all the [669] rights contended for on either side depended on special circumstances, and on a consideration as to the balance of them the decision depended. That case in no way affected rights and powers conferred upon public commissioners for public purposes.

In this case the only injury of which the appellant can possibly complain is one which he suffers, if at all, in common with the rest of the public; and for that his remedy is not by action for damages, or by private injunction, but by indictment: *Rex v. The Directors of the Bristol Dock Company* ⁽²⁾, a rule which had been acted on some years before in *Rex v. Russell* ⁽³⁾. The mere diminution of business convenience was held in *Rex v. The London Dock Company* ⁽⁴⁾ to give no right to a claim for compensation even as against a company authorized by act of Parliament, and the same principle was acted on in *Ricket v. The Metropolitan Railway Company* ⁽⁵⁾.

The power of the Conservators here is large; it was conferred for public purposes, and it must be liberally construed. *Galloway v. The Mayor of London* ⁽⁶⁾, *The Attorney-General v. The Corporation of Cambridge* ⁽⁷⁾, and *Kearns v. The Cordwainers' Company* ⁽⁸⁾, showed that where a public purpose was in view, it must be intended that the public officers appointed under an act of this sort would rightly exercise the power to do that which was necessary for the purpose of such act, though it might interfere with the convenience of a private individual.

In all the cases relied on for the appellant there was a clear legal right indisputably possessed by the plaintiff, and which had been affected, if not destroyed, by the act complained of. If the appellant had any legal private right distinct from the rights of all the other subjects it lay on him to prove it: *Anonymous* ⁽⁹⁾. Here there was nothing of

⁽¹⁾ Law Rep., 7 Q. B., 166.

⁽²⁾ 12 East, 428.

⁽³⁾ 6 East, 427.

⁽⁴⁾ 5 Ad. & E., 163.

⁽⁵⁾ Law Rep., 2 H. L., 175.

17 ENG. REP.

⁽⁶⁾ Law Rep., 1 H. L., 34.

⁽⁷⁾ Law Rep., 6 H. L., 303.

⁽⁸⁾ 6 C. B. (N.S.), 388; 28 L. J. (C.P.), 285.

⁽⁹⁾ 1 Mod., 105.

the sort. The legal right of the appellant was a right to the use of his river frontage—that he would enjoy now as he 670] had enjoyed it before—in no way whatever was *it proposed to be interfered with. He had not therefore any pretence to claim protection. On the other hand, he really sought to restrain the Conservators from authorizing what would be a public improvement, and denied to the Fishmongers' Company the full benefit to which that company was entitled from the frontage on the river, which really belonged to it.

Mr. Cotton replied.

THE LORD CHANCELLOR (Lord Cairns), after fully stating the facts of the case, the letters between the respondents and the Conservators on asking for the license to embank, and the sections of the statute particularly in question, said :

My Lords, it is to be observed that the power granted by the 53d section to the Conservators is not simply a power to be exercised by them with any view to the improvement of the navigation of the Thames. It is of course a power which, like every other power given them by the act, they are to exercise so as to preserve the navigation from injury ; but subject to this, it is a power of granting to individuals, upon a money payment, the privilege of doing what they otherwise could not do in a navigable river, of pushing out an embankment or work in front of their land into the body of the river.

It is also to be observed that the possession by the appellant of a west frontage to his wharf, and of the power of loading and unloading there as well as on the south, was to him a property of very great value. It was admitted at the bar on the part of the respondents, that the statements in the letters which I have read to the effect that the owner of Lyon's Wharf had not the same right of access to, and user of, the river on the west frontage which he had on the south could not be supported ; and it was admitted, and indeed could not be disputed, that if, independently of the act, this south frontage access, between his wharf and the river, had been cut off or interfered with, he might have maintained an action for damages ; and that in any public work executed under the powers of the Lands Clauses Consolidation Act the destruction or interruption of this access would be an "injuriouly affecting" of the appellant's land within 671] the meaning of *that act. The right to compensation in such a case under the terms of the Lands Clauses Consolidation Act was well established in this House in the cases

of *The Duke of Buccleuch v. The Metropolitan Board of Works* ⁽¹⁾ and of *The Metropolitan Board of Works v. McCarthy* ⁽²⁾.

Now, it is farther to be observed that no compensation whatever is provided by the Conservancy Act, for any injury done to the adjacent owners of lands on the banks of the river, by the execution of a license granted under the 53d section. Admitting, therefore, as may well be done, that a license under the 53d section would be a perfect justification for an embankment made by a riparian owner in front of his own land, so far as it merely affected the public right of navigation, it would appear to be, *a priori*, in the very highest degree improbable that an act of Parliament could intend, through the operation of that section, to authorize the Conservators to permit one riparian owner to affect injuriously the land of another riparian owner, in consideration of a payment to be made, not to the person injured, but to the Conservators themselves.

The appellant contends that the act has no such operation, and that any such operation is clearly prevented by the 179th section. That section is in these words: [His Lordship read it, see *ante*, p. 663.]

The Lords Justices held that it must be taken to be established, and it was not disputed at your Lordships' bar, that the appellant had in respect of the west side of Lyon's Wharf, at the time when the Conservancy Act passed, the ordinary rights of the owner of a wharf on the banks of a navigable river. The question is, what are those rights, and are they preserved intact by the 179th section?

Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank, nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, *it [672 assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction. It is, as was decided by this House in the cases to which I have referred, a

(1) Law Rep., 5 H. L., 418.

(2) Law Rep., 7 H. L., 243.

portion of the valuable enjoyment of the land, and any work which takes it away is held to be an "injurious affecting" of the land, that is to say, the occasioning to the land of an *injuria*, or an infringement of right. The taking away of river frontage of a wharf, or the raising of an impediment along the frontage, interrupting the access between the wharf and the river, may be an injury to the public right of navigation; but it is not the less an injury to the owner of the wharf, which, in the absence of any parliamentary authority, would be compensated by damages, or altogether prevented. It appears to me impossible to say that a mode of enjoyment of land on the bank of a navigable river which is thus valuable, and as to which a landowner can thus protect himself against disturbance, is otherwise than a right or claim to which the owner of land on the bank of the river is by law entitled within the meaning of such a saving clause as that which I have read.

The title of the appellant, however, appears to me to stand still higher than I have thus put it. Lord Justice Mellish takes notice that it was contended on behalf of the wharfing that the owner of premises abutting on a navigable river where the tide flows and reflows, has rights belonging to him as a riparian proprietor wholly distinct from the public right of navigation, and he goes to observe that the Lords Justices had been unable to find any authority for holding that a riparian proprietor where the tide flows and reflows has any rights or natural easements vested in him similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide⁽¹⁾.

With much deference for the Lords Justices, I should have thought that some authority should be produced [673] to show that the *natural rights possessed by a riparian proprietor, as such, on a non-navigable river, are not possessed by a riparian proprietor on a navigable river. The difference in the rights must be between rivers which are navigable and those which are not: and not between tidal and non-tidal rivers; for, as Lord Hale observes⁽²⁾, the rivers which are *publici juris*, and common highways for man or goods, may be fresh or salt, and may flow and reflow or not; and he remarks that the Wey, the Severn and the Thames, "and divers others, as well above the bridges as below, as well above the flowings of the sea as below, and as well where they are become to be the private propriety, as in what parts they are of the King's propriety,

(1) Law Rep., 10 Ch. Ap., at p. 689.

(2) De Jur. Mar., part i, c. 3.

are publik rivers *juris publici*." A riparian owner on a navigable river has, of course, superadded to his riparian rights, the right of navigation over every part of the river, and on the other hand his riparian rights must be controlled in this respect, that whereas, in a non-navigable river, all the riparian owners might combine to divert, pollute, or diminish the stream, in a navigable river the public right of navigation would intervene, and would prevent this being done. But the doctrine would be a serious and alarming one, that a riparian owner on a public river, and even on a tidal public river, had none of the ordinary rights of a riparian owner, as such, to preserve the stream in its natural condition for all the usual purposes of the land; but that he must stand upon his right as one of the public to complain only of a nuisance or an interruption to the navigation.

The Lord Justice suggests that the right of a riparian owner in a non-navigable river arises from his being the owner of the land to the centre of the stream, whereas in a navigable river the soil is in the Crown. As to this, it may be observed that the soil of a navigable river may, as Lord Hale observes, be private property. But putting this aside, I cannot admit that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream. The late Lord Wensleydale observed, in this House, in the case of *Chasemore v. Richards* (¹), "The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been *now settled that [674 the right to the enjoyment of a natural stream of water on the surface, *ex jure naturæ*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbor's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbor."

My Lords, I cannot entertain any doubt that the riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights, as an ordinary riparian owner, un-

(¹) 7 H. L. C., 382.

derlying and controlled by, but not extinguished by, the public right of navigation.

It cannot, as it seems to me, be open to doubt, that if the appellant at the time of the passing of the Conservancy Act had the ordinary rights of a riparian owner in the water of the river, that right was maintained by the saving clause; and being infringed, as it clearly was infringed, by the embankment of the Fishmongers' Company, he ought to be protected by the injunction of the court.

The authorities which were referred to during the argument appear to me, with one exception, to be in favor of the appellant. I have already referred to the two cases in your Lordships' House, *The Duke of Buccleuch v. The Metropolitan Board of Works* ⁽¹⁾, and *The Metropolitan Board of Works v. McCarthy* ⁽²⁾.

The case of *Rose v. Groves* ⁽³⁾ was a case where a riparian owner, having a public house on the Thames at Bermondsey, complained that his access to the river was obstructed by timbers and spars placed in the river by the defendants, which drifted at high water up to and along the plaintiff's land. Speaking of the declaration in the case, Lord Justice Tindal says ⁽⁴⁾: "A private right is set up on the part of the plaintiff; and to that he complains an injury has been [675] done. The declaration states that the *plaintiff carried on the business of an innkeeper in a house which abutted upon a certain navigable river, and was and of right ought to have been accessible from the river to persons navigating thereon in boats and other craft." And farther on he says, "It appears to me that the plaintiff is not complaining of any public injury. But even if he were, I think after the cases that have been cited, that he discloses a sufficient cause of action."

The Lord Justice Mellish states ⁽⁵⁾ that the Lord Justices thought they could not decide in favor of the appellant consistently with the case of *The Attorney-General v. The Conservators of the Thames* ⁽⁶⁾, and that they were not prepared to overrule that decision. As I understand that decision, it is one favorable, and not adverse, to the appellant's argument. The question there, no doubt, turned upon an obstruction and upon the effect of the saving clause in the Conservancy Act. But my noble and learned friend Lord Hatherley, then Vice-Chancellor, held in that particular case that the obstruction complained of by the wharfinger

⁽¹⁾ Law Rep., 5 H. L., 418.

⁽²⁾ Law Rep., 7 H. L., 243.

⁽³⁾ 5 Man. & G., 613.

⁽⁴⁾ Man. & G., at p. 620.

⁽⁵⁾ Law Rep., 10 Ch. Ap., at p. 693.

⁽⁶⁾ 1 H. & M., 1.

was not a direct interference with the access to his wharf, but was, if an obstruction, an obstruction to the general navigation of the river. But speaking of a direct interference with the access to a wharf, the Vice-Chancellor expressed himself as follows: "Now I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway on the river." The existence of such a private right of access was recognized in *Rose v. Groves* ⁽¹⁾. As I understand the judgment in that case, it went not upon the ground of public nuisance, accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff had been interfered with. The plaintiff, an innkeeper on the banks of a navigable river, complained that the access of the public to his house was obstructed by timber which the defendant had placed in the river; and it would be the height of absurdity to say, that a private right is not interfered with, when a man who has been accustomed to enter his house from a highway, finds his door made impassible, so that he no longer has access to his house from the *public highway. This would [676] equally be a private injury to him, whether the right of the public to pass and repass along the highway were or were not at the same time interfered with. In *Rose v. Groves* ⁽¹⁾ Chief Justice Tindal put the case distinctly upon the footing of an infringement of a private right. He says: "A private right is set up on the part of the plaintiff, and to that he complains that an injury has been done;" and then, after stating the facts, adds: "It appears to me, therefore, that the plaintiff is not complaining of any public injury." Independently of the authorities, it appears to me quite clear, that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right."

The case which appears at first sight to be unfavorable to the argument of the appellant is that of *Kearns v. The Cordwainers' Company* ⁽²⁾. In that case, however, the only question was one between a lessee and his lessor as to the

⁽¹⁾ 5 Man. & G., 613.

⁽²⁾ 6 C. B. (N.S.), 388.

propriety of an award which directed the lessor to apply for a license to embark under the Conservancy Act. It was contended by the lessee that that license if obtained would not exclude the rights of adjacent owners; to which it was replied in defence of the award that the license under the act would be effectual, because the adjacent owners would not be within the saving clause. But there was no adjacent owner before the court, and the court proceeded upon the supposition of what might be said for or against those who were not there to argue their own case. I cannot, therefore, look on the expressions of the learned judges in that case as entitled to the same weight as if they had been made after an actual issue of right had arisen.

Lord Justice Mellish, indeed, refers to two other cases, *Marshall v. The Ulleswater Company* (¹) and *The Eastern Counties Railway Company v. Dorling* (²), not for the purpose of showing that there is no such private right as alleged by the appellant, "but as proving" (³), to use the Lord Justice's own words, "that the wharfinger is amply protected in his right of access to his wharf by his interest as one of the public in the right of public navigation, and that there is no necessity to invent any private right in him as a riparian proprietor." It is sufficient to say that these cases appear to me to be irrelevant, and that the question is not as to inventing a private right in the riparian proprietor, but what are the rights of a riparian proprietor actually existent which are referred to in, and saved by, the 179th section.

On the whole I cannot but arrive at the conclusion that the decree of the Lords Justices ought to be reversed, and that the decree of the Vice-Chancellor Malins of the 3d of May, 1875, ought to be restored, and that it should be declared that the petition of appeal of the Fishmongers' Company to the Court of Appeal in Chancery ought to have been dismissed with costs.

LORD CHELMSFORD: My Lords, the questions for the determination of your Lordships upon this appeal are: First. What are the powers of the Conservators of the River Thames under the 53d section of the act of 20 & 21 Vict. c. cxlvii, for the conservancy of the river, and the restriction of those powers in respect to the private rights of individuals. 2dly. Whether there is any individual right or privilege in the owner or occupier of Lyon's Wharf peculiar

(¹) Law Rep., 7 Q. B., 166.

(²) Law Rep., 10 Ch. Ap., at p. 692.

(³) 5 C. B. (N.S.), 821.

to his river frontage, distinct and different from the right of all the Queen's subjects in the highway of the river.

Upon this second question the Lords Justices said they were "unable to find any authority for holding that a riparian proprietor where the tide flows and reflows has any rights or natural easements vested in him similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide." But, with great respect, I find no authority for the contrary proposition, and I see no sound principle upon which the distinction between the two descriptions of natural streams can be supported. And it appears to me *that cases have been decided which are strongly [678 opposed to it. Why a riparian proprietor on a tidal river should not possess all the peculiar advantages which the position of his property with relation to the river affords him, provided they occasion no obstruction to the navigation, I am at a loss to comprehend. If there were an unauthorized interference with his enjoyment of the rights upon the river connected with his property, there can, I think, be no doubt that he might maintain an action for the private injury.

The owner of Lyon's Wharf has a double frontage to the Thames, one frontage to the south and the other to the west. The west frontage he has used for the purpose of loading and unloading goods into craft, in Winckworth's Hole, which is admittedly part of the river Thames. No question of prescription enters into the case. The owner of the wharf has an undoubted right to use the river flowing up to his premises in the manner he has done, whenever that user commenced. The authority conferred by the license of the Conservators on the Fishmongers' Company, if exercised, would entirely fill up Winckworth's Hole and cut off all access of barges to the west front of Lyon's Wharf.

The Lords Justices held that the Conservators have power to grant this license under the 53d section of the act, and that this power is not restricted by the 179th section in respect of the owner of Lyon's Wharf, for the reason they had already given, that a riparian proprietor has no rights over the river or the shore of the river, beyond the rights of the rest of the public. They say that "the only authority which was cited for the proposition that a riparian proprietor had such rights was the case of *Rose v. Groves* (¹), and what was said by my noble and learned friend Lord

(¹) 5 Man. & G., 813.

Hatherley in *The Attorney-General v. The Conservators of the River Thames* ⁽¹⁾, which, however, was entirely founded on the case of *Rose v. Groves* ⁽²⁾, which they thought "was not a sufficient authority for the proposition it was cited to support." "That the declaration was ambiguously framed, so that it was difficult to tell whether the pleader intended to rely on the violation of a public right or a private right." Now the case was determined upon a motion in arrest of judgment, in which the only question *was whether the declaration disclosed a good cause of action. The court unanimously held that the declaration did not complain of any public injury, and Mr. Justice Maule said ⁽³⁾: "Supposing that the declaration did allege a nuisance to a public highway, still there is a clear statement of a private injury to the individual complaining, but I think no public injury is alleged." The Vice-Chancellor was therefore justified in the passing remark he made in *The Attorney-General v. The Conservators of the River Thames* ⁽⁴⁾, which the Lords Justices disputed, that if the Fishmongers' Company had their wharf with the right of access to the river, and this were taken away, they would be within the provisions of the 179th section, and would be entitled to an injunction.

The Lords Justices state as the result of their judgment that the right of a wharfinger to bring an action or file a bill for an obstruction in the river that renders the access to his wharf less convenient, and one which deprives him of all means of access, depends on the same legal principle, viz., that he suffers a particular damage from a public nuisance, and in neither case is there a violation of any private right of his distinct from the public right of navigation which is in all the Queen's subjects. And they held that they could not affirm the decision of the Vice-Chancellor consistently with the cases of *Kearns v. The Cordwainers' Company* ⁽⁵⁾, and *The Attorney-General v. The Conservators of the Thames* ⁽⁶⁾.

These cases appear to me not to have been decided upon the ground that a private right in a public river could not exist. In *Kearns v. The Cordwainers' Company* ⁽⁷⁾, the Court of Common Pleas was of opinion that the only right which was interfered with was a right of enjoyment in the free navigation of the river which the plaintiff had in common with the rest of the public. And in *The Attorney-General v. The Conservators of the River Thames* ⁽⁸⁾, the

⁽¹⁾ 1 H. & M., 1.

⁽²⁾ 5 Man. & G., 613.

⁽³⁾ 5 Man. & G., at p. 622.

⁽⁴⁾ 6 C. B. (N.S.), 388.

Vice-Chancellor, after making the observations with regard to the private right of the Fishmongers' Company, to which I have already referred, added: "but in truth the access is not blocked up. The wharf will not be as readily and easily approached, and perhaps not at all by the same route, but that is a mere interruption *to the navigation of [680 the river which they enjoy in common with the public, and not as part of their special right of access."

The Solicitor-General argued that under the 53d section of the act the Conservators have an absolute and unrestricted power to authorize the owner and occupier of land fronting and immediately adjoining the river, to form an embankment into the body of the river, and that the 179th section did not apply to the power conferred by the 53d section. But the 179th section qualifies and restricts whatever powers are vested in the Conservators by the act. It enacts that none of the powers by this act conferred, or anything in this act contained, shall extend to take away, alter, or abridge any right, claim, &c., to which any owner or occupier of any lands, tenements, or hereditaments on the banks of the river are now by law entitled. But then it was said that if the 179th section did apply, the right protected by it is a right of property and not a right of action, for which the opinion of Mr. Justice Crowder in *Kearns v. The Cordwainers' Company* (*) was quoted. A right of action in the present case, which it cannot be disputed Lyon might have maintained against an individual obstructing the access to the west front of his wharf, would be an action for an injury to the enjoyment of his right of property. And so the obstruction authorized by the Conservators, if carried out, will take away, or at all events alter or abridge, his right to the free and lawful application of his property to the purposes of his business.

To show that the owner of Lyon's Wharf has a private right which is protected by the 179th section, the counsel in the court below cited the cases of *The Duke of Buccleuch v. The Metropolitan Board of Works* (") and *The Metropolitan Board of Works v. McCarthy* (") decided in this House, of which the Lords Justices took no notice in their judgment, although they appear to me to be conclusive authorities in the appellant's favor. In these cases it was determined that a riparian proprietor on the river Thames and the owner of lands near a public dock upon the river, were entitled to compensation in respect of their lands being

(*) 6 C. B. (N.S.), 388.

(") Law Rep., 7 H. L., 243.

(*) Law Rep., 5 H. L., 418.

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injuriously affected by being deprived of access to the river and to the dock. Lord Campbell in *Re Penny* ⁽¹⁾, which [681] was the case of a *claim for compensation under the Lands Clauses and Railways Clauses Acts, stated this to be the test of the right, that "unless the particular injury would have been actionable before the company had acquired statutory powers, it is not an injury for which compensation can be claimed."

The Lords Justices held that Lyon, a riparian proprietor, had no such right of action, nor any right in respect of his property upon the banks of the river distinct from the public right of navigation in all the Queen's subjects. But when this House decided, in the above cases, that the owners of lands on the river were injuriously affected by having their access to the river cut off; as the test of such injury was the right to maintain an action, if no statutory powers had been granted, the decisions are directly opposed to the judgment of the Lords Justices, and if they had considered them, must, I venture to think, have led them to a different conclusion.

I agree that the order of the Lords Justices, reversing the decree of the Vice-Chancellor, ought to be reversed.

LORD SELBORNE: My Lords, the judgment under appeal seems to be founded upon these two propositions: First. That a riparian proprietor on the bank of a tidal navigable river has no rights or natural easements similar to those which belong to a riparian proprietor on the bank of a natural stream above the flow of the tide. Secondly. That a riparian proprietor, whose frontage and means of access to such a tidal river is cut off, by an encroachment from adjoining land into the stream, suffers no loss or abridgment of any private right belonging to him as such riparian proprietor, but is only damnified in common with the rest of the public by the diminution of the water space in the navigable stream, and by such obstruction of the navigation as may be consequent thereon.

The Lords Justices were of opinion that there was no authority at variance with these propositions. To me the propositions appear to be at variance with the opinions delivered in this House, both by the judges who attended your Lordships and by the noble Lords who took part in [682] the decision, in the case of *The Duke of Buccleuch v. The Metropolitan Board of Works* ⁽²⁾, by which opinions the decision of this House in that case was governed. I also think them at variance with the views of the law, ap-

⁽¹⁾ 7 El. & Bl., at p. 669.

⁽²⁾ Law Rep., 5 H. L., 418.

plicable to such a case as the present, which were expressed by the learned judges who decided *Rose v. Groves* (') and *The Attorney-General v. The Conservators of the Thames* (*). The Lords Justices thought that the latter of those two decisions would have been virtually overruled, if the judgment of the Vice-Chancellor in the present case had been affirmed; but they only arrived at that conclusion by themselves first overruling a distinction which the Vice-Chancellor, who decided that case, held, without doubt, to be well founded in law.

Upon principle, as well as upon those authorities, I am of opinion that private riparian rights may, and do, exist in a tidal navigable river. The most material differences between the stream above and the stream below the limit of the tides are, that in an estuary or arm of the sea there exist, by the common law, public rights in respect of navigation and otherwise, which do not generally (in this country) exist in the non-tidal parts of the stream; and that the *fundus* or bed of the non-tidal parts of the stream belongs, generally, to the riparian proprietors, while in the estuary it belongs generally to the Crown. But the rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has, by nature, the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream. Water which is more or less salt by reason of the flow of the tides may still be useful for many domestic and other purposes, though there are no doubt some purposes which fresh water only will serve. The general law as to riparian rights is not stated by any authorities, that I am aware of, in terms which require this distinction, and, if there is any sound principle on which it ought to be made, the burden of proof seems to me to lie on those who so affirm.

As for the public right of navigation, it may well coexist with *private riparian rights, which must of course [683 be enjoyed subject to it; just as where there is no navigation, each riparian proprietor's right is concurrent with, and is so far limited by, the rights of other proprietors.

With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so called, because the word "riparian" is relative to the bank, and not the bed, of the stream; and the con-

(') 5 Man. & G., 613.

(*) 1 H. & M., 1

nection, when it exists, of property on the bank with property in the bed of the stream depends, not upon nature, but on grant or presumption of law. In some tidal navigable rivers (as the Severn) parts of the bed of the tidal stream belong to riparian owners; and it appears from Mr. Angell's book ⁽¹⁾ (often quoted in our courts) that in Pennsylvania and Alabama, states whose jurisprudence is founded generally on English law, the whole property in the beds of large non-tidal navigable rivers is in the state. The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good, *jure naturæ*, as vertical; and not only the word "riparian," but the best authorities, such as *Miner v. Gilmour* ⁽²⁾ and the passage which one of your Lordships has read from Lord Wensleydale's judgment in *Chasemore v. Richards* ⁽³⁾, state the doctrine in terms which point to lateral contact rather than vertical. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right.

Even if it could be shown that the riparian rights of the proprietor of land on the bank of a tidal navigable river are not similar to those of a proprietor above the flow of the tide, I should be of opinion that he had a right to the [684] river frontage belonging *by nature to his land, although the only practical advantage of it might consist in the access thereby afforded him to the water, for the purpose of using, when upon the water, the right of navigation common to him with the rest of the public. Such a right of access is his only, and is his by virtue, and in respect of, his riparian property; it is wholly distinct from the public right of navigation. In the words of Lord Justice Mellish ⁽⁴⁾: "The right of embarking and disembarking, and so using his property as a wharf for the loading and unloading of goods," is, "a most valuable right," and I am at a loss to see why it should not be recognized as entitled

⁽¹⁾ Angell on Watercourses.

⁽²⁾ 12 Moo. P. C., 131.

⁽³⁾ 7 H. L. C., 349.

⁽⁴⁾ Law Rep., 10 Ch. Ap., at p. 689.

to protection under the 179th section of the Thames Conservancy Act, although (as the Lord Justice went on to say), "it arises simply from the fact, that he owns land immediately abutting on a public navigable river, which he, as one of the public, is entitled to use for the purpose of navigation."

It was admitted, that if the case had been for compensation under the Lands Clauses Acts, the land of the riparian proprietor would, by the deprivation of this water frontage, be "injuriously affected." But unless this was an interference with some right or privilege, recognized by law as belonging or incident to the land, it would be no actionable wrong, as an injury to the land, although not authorized by Parliament; and in that case the land would not be "injuriously" affected. If, on the other hand, it is an interference with a right or privilege recognized by law as belonging to the land, that right or privilege is certainly not identical with the public right of navigation. The cases as to alterations of the levels of public highways, by which houses immediately adjoining have been deprived of their access to and from the highway, seem to be authorities *à fortiori* on this point; because they had not in them the element of a right *jure naturæ*. If I correctly understand the Irish case of *Moore v. The Great Southern and Western Railway Company* (1), which was approved and followed by the English Court of Queen's Bench in *Chamberlain v. The Crystal Palace Railway Company* (2), those authorities recognize such a right of immediate access from private property to a public highway, as a private right, distinct from *the right of the owner of that prop- [685 erty to use the highway itself, as one of the public.

That a public body, such as the Thames Conservancy Board, should be empowered by Parliament to sell, for money, to private persons the right to execute, for their own benefit, works injuriously affecting the land of an adjoining proprietor without compensating him for that injury, (which is the contention of the respondents), is inconsistent with the ordinary principles and with the general course of public legislation on such subjects. When, therefore, we find in the act which is alleged to confer such powers a saving clause in the large and untechnical terms of the 179th section, by which (without any forced or unreasonable extension of their natural meaning) this class of rights may be sufficiently protected, I think we ought not to hesitate to construe it so as to afford that protection.

(1) 10 Ir. C. L. Rep. (N.S.), 46.

(2) 2 B. & S., 605-617.

I am, for these reasons, of opinion that the present appeal should be allowed.

Decree appealed from reversed; decree of Vice-Chancellor Malins, of the 3d of May, 1875, restored; cause remitted to the Court of Chancery, with a declaration that the petition of appeal of the Court of Appeal in Chancery ought to have been dismissed with costs.

Lords' Journals, 27th July, 1876.

Solicitors for the appellant: *Brettell, Smythe & Brettell.*

Solicitor for the respondents: *C. O. Humphreys.*

As to how far an individual may fill up or obstruct a navigable river in front of his premises, see 9 Eng. Rep., 580 note; 14 Eng. Rep., 388 note; 10 Eng. Rep., 25 note; Allegheny City v. Moorehead, 80 Penn. St. R., 118; 3 Southern Law Rev., N.S., 119; Musser v. Hershey, 42 Iowa, 356; Norfolk v. Cooke, 27 Gratt. (Va.), 430; Ross v. Faust, 54 Ind., 471; Barney v. Keokuk, 94 U. S. R., 324; McCready v. Virginia, Id., 391; Trustees, etc., v. Surveyors, 7 Best & Smith, 348; Ipswich, etc., v. Overseers, Id., 310.

As to exclusive right of fishery by adjoining owner: Robertson v. Steadman, 3 Pugsley's (N. B.) Rep., 621.

As to proceedings to improve creeks and streams: Clay v. Pennoyer, etc., 34 Mich., 204.

Right to gravel in bed of river: Ross v. Faust, 54 Ind., 471.

Right of state to control planting of oysters in: McCready v. Virginia, 94 U. S. R., 391.

Duty of owner to repair after state has banked out: Philadelphia v. Scott 81 Penn. St. R., 80.

[1 Appeal Cases, 686.]

H.L. (Div.), March 16, 1876.

[HOUSE OF LORDS.]

686] *CAPTAIN DE THOREN, Appellant; THE ATTORNEY-GENERAL *et al.*, Respondents.

Scotch Doctrine of Habit and Repute as to Marriage.

Per LORD SELBORNE: Habit and repute is not a mode of constituting but of proving a marriage; and when a true and undivided habit and repute is shown, a presumption of the marriage arises by the law of Scotland.

Per THE LORD CHANCELLOR (1): The presumption of marriage is much stronger than the presumption in regard to other facts.

When a matrimonial ceremony took place in Scotland, the parties being ignorant of an impediment, afterwards removed, and when, believing themselves to be validly married, they lived together continuously for years as husband and wife, and were regarded as such by all who knew them, the marriage was held to have been established by the force of habit and repute, without any proof of mutual consent by verbal declaration.

It must be inferred that the matrimonial consent was interchanged as soon as the parties were enabled, by the removal of the impediment, to enter into the contract.

The *onus* of rebutting a marriage by habit and repute is thrown on those who deny it.

Per LORD CHELMFORD: The ceremony which took place, although invalid, was undoubtedly a consent by the parties to live together as husband and wife. And their subsequent cohabitation was a proof of continued consent.

(1) Lord Cairns.

ON the 1st of July, 1862, Mr. William Ellis Wall obtained from the Divorce Court at Westminster a decree dissolving his then marriage, but not enabling him to marry again until the expiration of the period allowed for appealing to the House of Lords, which occurred in this case on the 19th of February, 1863.

Ignorant of this temporary impediment, and thinking that he might marry again immediately on obtaining the divorce, Mr. Ellis Wall, at Glasgow, in St. Jude's Church, on the 16th of July, 1862, was married to—or, rather went through the ceremonial of marriage with—Miss Sarah Ogg, both parties honestly believing that there was no obstacle to their union. They afterwards resided together constantly as husband and wife, and were everywhere regarded [687 and treated as such in Scotland, in Ireland, and in England, till the death of Mr. Ellis Wall, in November, 1867. Of the connection there were four children, two sons and two daughters. One of the sons, William Ellis Wall, was born in Scotland, on the 30th of August, 1866, and the other, Edward William Wall, was born in England, on the 17th of March, 1868.

On the 22d of May, 1872, the two sons, having an interest in English real property, presented by their mother and guardian a petition to the Court for Divorce and Matrimonial Causes, praying a declaration that they “were severally legitimate sons of the aforesaid William Ellis Wall, and Sarah Wall, and that the marriage aforesaid contracted prior to the birth of the petitioners was a valid marriage.”

The legitimacy of the children of course depended on the validity of their parents' marriage; and the question, one of Scotch law, was, whether the undoubted fact of continued “habit and repute” was, under the circumstances, of itself sufficient to prove a marriage, without any interchange of verbal matrimonial declaration—of which there was neither evidence nor allegation.

The Judge Ordinary asked the opinion of the Court of Session in Scotland, under 22 & 23 Vict. c. 63, s. 1, and obtained for answer that “before the birth of the eldest son, the parents had become married persons” (1).

Sir James Hannen decided that “the parents had contracted with each other a valid marriage prior to the 30th of August, 1866, and that the sons were legitimate.”

Against this decision, Captain de Thoren appealed to the House, having for his counsel *The Solicitor-General* (Sir H. Giffard, Q.C.), Mr. *Matthews*, Q.C., Mr. *Thesiger*, Q.C.,

(1) 4 Series of Scotch Cases, vol. i, p. 1036.

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De Thoren v. Attorney-General.

H.L. (Div.)

and Mr. *H. D. Greene*. The respondent's counsel were *The Attorney-General* (Sir *J. Holker*), *The Solicitor-General for Scotland* (Mr. *Watson*), Mr. *Southgate*, Q.C., Dr. *Spinks*, Q.C., and Mr. *A. E. Hardy*.

The appellant's counsel argued that inasmuch as the parents had always regarded themselves as having validly intermarried from and after the Glasgow ceremonial, there was not and there could not be a subsequent interchange of nuptial consent; and the mere "habit and repute" was of [688] itself insufficient to constitute a *marriage; so that the decision declaring the sons legitimate ought to be reversed.

At the conclusion of the arguments on behalf of the appellant their Lordships delivered the following opinions:

THE LORD CHANCELLOR⁽¹⁾: My Lords, in deciding the question of legitimacy raised by this case your Lordships will not, I think, find yourselves in any way embarrassed by the particular procedure which has taken place in the court below. The petition was filed in the ordinary way; no formal issues were framed in the case, apart from those which the case itself raised; evidence was given before the Judge Ordinary, and among that evidence was the evidence of experts with regard to the law of Scotland. The Judge Ordinary considered that he, sitting as an English judge, might not be able to draw inferences as to Scotch law from the evidence tendered before him in the way that a Scotch court could do; and, availing himself of the powers given by the acts of Parliament relating to the subject, he sent a case for the opinion of the Scotch court upon a certain point, which he placed before it. The opinion of the Scotch court was given in favor of the marriage; and therefore in favor of the legitimacy. The learned Judge Ordinary pronounced his final decree, establishing the legitimacy upon all the materials before him; and all those materials are now before your Lordships, and your Lordships sit here as a Court of Appeal, not merely from the decision of the English court, the Court of Probate, but also, under the statute, with power to review the opinion expressed by the Scotch court upon the case sent to them, if your Lordships think that opinion ought to be reviewed.*

My Lords, the question here comes to be simply this. A man and a woman being both at the time in Scotland, go through a ceremony of marriage in a church. They are under the impression that the marriage is a valid one, and that they have done everything that is necessary to make it

(¹) Lord Cairns.

valid. The man had shortly before been divorced in England, that is to say, there had been a decree *nisi* of the Matrimonial Court for a divorce, *which decree *nisi* [689 was afterwards made absolute. But at that time there was a certain length of time given, which has since been taken away, during which an appeal against the sentence of the Matrimonial Court might have been brought, and that time had not elapsed ('). The parties were not aware that that circumstance created an impediment to a valid marriage. Having gone through the ceremony they lived as husband and wife, and were reputed to be husband and wife. They had children; and those children were treated as being legitimate. There was a question of succession to real property in the case, and it is clearly shown that the man was anxious to have legitimate children, and believed that he had legitimate children who would succeed to that property. They resided, subsequently to the marriage ceremony, for some years in Scotland, and for another part of the time out of Scotland. Under those circumstances, putting aside for the moment any inference which ought to be drawn from the fact of both parties being ignorant of the impediment to marriage, and looking merely to the habit and repute to which I have referred, and which continued altogether for a period of, I think, about ten years, and until the death of the man; looking merely to these facts there cannot be any doubt (indeed, it is not disputed at the bar) that there would be ample ground for presuming, according to the law of Scotland, that marriage by consent of which cohabitation with habit and repute is evidence.

But it is said that the inference of marriage is rebutted, because you have here the parties commencing their cohabitation under the belief that the ceremony of marriage was a valid ceremony, and that, therefore, unless you can show that they afterwards were undeceived upon this point, and in some way or other actually must be taken to have assented or consented to a fresh contract of marriage, you cannot imply from the cohabitation with habit and repute that a marriage by the interchange of consent actually took place.

Now, my Lords, I cannot in any way accept that argument. I may refer, in the first place, to the case of *Piers v. Piers* (') before your Lordships' House, in which, although the facts were *in many respects different [690

(') As to liberty to divorced parties to re-marry, see 31 & 32 Vict. c. 77, s. 4, Divorce, p. 484.

(*) 2 Cl. & F., 331.

from the present, yet it was held in a most striking way as a general rule that the presumption of marriage is not the same as the presumption raised with regard to other facts, which may be presumed either the one way or the other; that the presumption of marriage is something much stronger; and that from cohabitation with reputation a marriage is to be presumed unless there is strong and cogent evidence to the contrary. One of the most striking cases that can well be imagined upon this subject is the *Breadalbane Case* (¹), in which the presumption was held to be one that not only might be drawn but ought to be drawn from the cohabitation with habit and repute, although in that case the cohabitation commenced with a ceremony of marriage which not only was invalid by reason of the real husband of the woman being alive, at the time, but was known to both parties to be invalid. Your Lordships held that, notwithstanding that the marriage could not have been valid at the inception, notwithstanding that both parties knew that it was invalid, notwithstanding that both must have known that at the commencement of their cohabitation that cohabitation was illicit; still the presumption of marriage might and ought to be drawn.

My Lords, I own it appears to me that that was a somewhat stronger case than the present, because it might well have been fairly contended, and it was contended with great energy, that any presumption of marriage ought to be held to be rebutted by the fact that the cohabitation at the beginning could not have been intended by the parties themselves to be a cohabitation for the purpose of marriage, because they must have known that their marriage could not be valid. Here, on the contrary, the cohabitation began with the full intention of the parties themselves that their cohabitation should be upon the footing of a legitimate and valid marriage, and they were under the impression that there was a legitimate and valid marriage. If that is so I ask, Why should it not be presumed from the cohabitation with habit and repute that as soon as that obstacle was removed, which it very shortly was, a consent was exchanged between the parties to be husband and wife, when you would make that presumption in a case such as the *Breadalbane Case* was.

My Lords, I will refer to the *Breadalbane Case* for the [691] *purpose of reminding your Lordships of some, or at least of one of the opinions that were there expressed. Lord Westbury says: "The appellant objects that cohabi-

(¹) Law Rep., 2 H.L. Sc., 269.

tation, which began when the parties were incapable of contracting marriage, and which was continued without change, is ineffectual to form the basis of the conclusion that consent to marry was interchanged after the impediment to marriage had been removed. That would be a very important rule if it were proved to be well founded; but I am unable to find any principle to justify the introduction of such a rule; and what is more material to the purpose, I am unable to find any case or any book of authority in which that principle has been either followed out into a decision or has been laid down as a rule of Scotch law. There is nothing to warrant the proposition that the subsequent conduct of the parties shall be rendered ineffectual to prove marriage by reason of the existence at a previous period of some bar to the interchange of consent. It would be very unfortunate if it were so. Marriage may be contracted between parties in a foreign land where certain observances are required which *from ignorance or mistake may not have been fulfilled.*"

So that, your Lordships will observe, Lord Westbury here puts as an illustration the very case which here occurs. He continues: "The parties having cohabited on the strength of an *imperfect celebration*, may afterwards come to Scotland and reside there for years, continuing the same course of life. It would indeed be a very sad thing if such a course of conduct, lasting, perhaps, for twenty or thirty years, were insufficient to warrant the conclusion of marriage. There is no foundation for the argument that the matrimonial consent must of necessity be referred to the commencement of the cohabitation. I think a sounder rule and principle of law will be that you must infer the consent to have been given at the first moment when you find the parties able to enter into the contract."

The argument at your Lordships' bar has consisted principally of a minute criticism of the wording of the case sent by the Judge Ordinary for the opinion of the Scotch court, and an attempt to establish that the wording of that case merely amounts to certain findings by the Judge Ordinary which in some way established as matters of fact the statements which are made for the particular purpose of this case. I do not myself read these statements as doing more than saying, on the part of the Judge Ordinary to the Scotch court, that he cannot point to specific evidence of an exchange of consent, but leaving entirely to the Scotch court the duty, if it be their duty, and if they think it is their duty, to draw the inferences which

the Scotch law would warrant. For example, my Lords, the principal statement relied upon in that case is this: Paragraph 5 states—"From the time of the said marriage 692] ceremony on the 16th of July, 1862, till *the death of the said William Ellis Wall, which occurred at Sidmouth, in England, on the 23d of July, 1871, he and the said Sarah Ogg constantly, continuously and openly, lived and cohabited together as husband and wife, and were holden and reputed to be so by their relations and friends and by all who knew them. They so lived and cohabited together in Scotland from the 16th of June, 1862, till May, 1863; in Ireland from May, 1863, till March, 1864; in Scotland from March, 1864, till November, 1867; and in England from November, 1867, till the death of the said William Ellis Wall. The habit and repute which attended from cohabitation from the first and throughout was undivided."

The 6th paragraph states—"The said William Ellis Wall and Sarah Ogg intended to contract marriage together. The marriage ceremony of the 16th of July, 1862, took place in pursuance of that intention. They believed, and never prior to the death of the said William Ellis Wall ceased to believe, that the marriage ceremony was lawful and valid, and throughout their cohabitation they intended to stand to each other in the relation of husband and wife, and believed that they did so, and their said treatment of each other as husband and wife, and of their children as legitimate offspring, was due to this belief. The said William Ellis Wall and the said Sarah Wall did not at any time after the said 16th of July, 1862, interchange or express to each other any consent to marry, or make any acknowledgment with the purpose of contracting a marriage, unless such consent or acknowledgment is to be inferred as a presumption of law from the facts herein stated."

My Lords, I rather incline to the opinion that that amounts to nothing more than a statement that, except as far as a presumption of law was proper to be drawn from the facts, it had not been affirmatively and directly proved before the learned judge that there was any interchange of consent to marry. And undoubtedly no such exchange of consent was proved. If it had been proved the reference to cohabitation with habit and repute would have been altogether unnecessary. But I certainly hold that your Lordships are here entirely free to look at once at the evidence given before the learned judge and at the judgment of the Judge Ordinary founded upon that evidence, and that your Lordships are not in any way fettered, as I have said, by the

statement of facts which was made for one purpose, and one purpose only, namely, to obtain the opinion of the Scotch court.

Turning to the evidence given before the Judge Ordinary, your Lordships find that Mrs. Sarah Wall was examined. In her direct examination she proves that after the marriage ceremony in July, 1862, she lived with William Ellis Wall as her husband till his death; that children were born; that during the lifetime of *Wil- [693 liam Ellis Wall they visited and were visited as husband and wife, and treated each other constantly in all respects upon that footing; that their children were received as legitimate, and no doubt existed in their own minds that they were so; that Mr. Wall was anxious for a son, that he told her so, and the reason was that he was to inherit entailed property in England; that when they lived at Dalkeith they were visited by the father and mother of William Ellis Wall, who took away the eldest girl on a visit. Certain letters are then put in passing upon the footing of their being husband and wife. That being the evidence in chief, she is then cross-examined by those who were interested to rebut the presumption of law, but in her cross-examination she is not asked one single question with the view of negating the presumption, or of proving that no consent passed between them, after the impediment to marriage was removed. My Lords, if that is so, if those who have the *onus* of rebutting the presumption cast upon them take no step to rebut that presumption, I apprehend that the presumption remains in its full force and vigor.

Upon these grounds, my Lords, I submit that the decision of the Judge Ordinary establishing the legitimacy in this case is entirely correct, and that this appeal ought to be dismissed with costs.

LORD CHELMSFORD: My Lords, the question to be determined is whether there was a consent to a marriage between William Ellis Wall and Sarah Ogg, evidenced by habit and repute, prior to the birth of the elder of the sons. If there were no other question than this in the case there would be no difficulty in giving an answer in the affirmative. But the appellant, though he admits that there had been such cohabitation of the parties as husband and wife as in an ordinary case would have conclusively established the presumption of a marriage by consent, yet contends that the circumstance of a previous ceremony of marriage having taken place between the parties, which was invalid, though unknown to them to be so, pre-

vented that presumption. The ground of this argument is that the living together of the parties as husband and wife must be attributed to the invalid ceremony, and therefore that the habit and repute could not be evidence of any other consent.

694] *In the case sent by the Judge Ordinary it is stated that prior to the death of William Ellis Wall, he and Sarah Ogg never ceased to believe that the marriage ceremony was lawful and valid. There was no evidence given before the Judge Ordinary to this effect. Mrs. Wall was called as a witness, and no question to elicit that fact (if it existed) was put to her. If then, the case is to be disposed of upon the facts, without reference to the case prepared to obtain an opinion as to the law, it appears to me to be quite open to your Lordships to presume (especially in favor of the legitimacy of the sons) that knowledge of the invalidity of the marriage was acquired during the cohabitation, and that the parties subsequently lived together as husband and wife. If it be asked why, with this knowledge, they did not marry openly *in facie ecclesiæ*, it may be answered that probably they did not desire to have it known that they had been cohabiting without being lawfully married, and that it was unnecessary in Scotland, as their continuing to live together as man and wife afterwards would be of equal efficacy with an actual marriage.

But taking the facts as they are stated in the case, and applying the law to them, the Court of Session is of opinion that, assuming the ignorance of the parties of the invalidity of the ceremony of marriage during the whole period of their cohabitation, yet after the removal of the impediment to their marriage and before the birth of their eldest son, they became married persons.

I agree entirely with this opinion. A marriage is established by habit and repute on the ground that the cohabitation as husband and wife is proof that the parties have consented to contract the relation. If any legal impediment exists to prevent their marrying, as long as it continues no presumption of consent can arise. But if the cohabitation begins in an illicit intercourse, and is continued after the bar to marriage (whatever it may be) is known to be removed, habit and repute may have their proper operation upon the continuing cohabitation, which is not to be referred to the original intercourse.

In the present case the ceremony which took place, although invalid, was undoubtedly a consent by the parties

to live together as husband and wife. And their subsequent cohabitation was a proof of continued consent.

*But the appellant seeks to displace the case [695 founded on habit and repute altogether by reason of the invalid ceremony of marriage, to which he contends the consent must necessarily be referred. Assuming this to be correct, the proof of consent being unquestioned, what difference can it make that the motive to such a consent was an erroneous belief that the parties had the sanction of a legal marriage. The habit and repute arising from the parties having lived together as husband and wife for many years was amply sufficient to prove their consent to contract this relation. Can the invalid ceremony of marriage, which strengthens the proof of consent, have the effect merely of not weakening, but of entirely destroying that proof? No valid consent could, of course, be given during the time allowed for appealing against the decree of divorce. But as soon as that time had passed there was nothing to prevent the marriage of the parties, or to invalidate any consent to become husband and wife; and their living together so many years as married persons raised a presumption of their consent to contract that relation, which could only be rebutted by proof of some fact which raised an impediment to their marriage.

LORD O'HAGAN: My Lords, the appellant's case rests really on the 7th paragraph of the paper submitted by the Judge Ordinary to the Scottish judges. He insists that it sufficiently negatives any interchange of consent to marry, or any acknowledgment with the purpose of contracting marriage, between the father and mother of the respondents at any time after the invalid ceremony of the 16th of July, 1862. Unless it amounts to such a negation, and unless your Lordships are bound to accept and act upon it, this appeal must be dismissed. There is no other foundation for it, and so the learned counsel for the appellant have admitted at the bar.

I am clearly of opinion that it does not negative either the interchange or the acknowledgment; and even if it did, it would not avail the appellant as against the evidence in the case. It is not at all a positive negation of consent, for it is qualified by the concluding words, "unless such consent is to be inferred as a presumption of law from the facts herein stated." If those facts raise that presumption, its negative force is gone and the consent *is established. [696 And so the Scottish court has held, and so the Judge Ordinary has found, acting on its authority.

But I fully agree that even if the appellant's construction of the paragraph had been maintainable, it would not have been conclusive on this House. The whole matter is before your Lordships. You have the entire evidence open to your consideration. The Judge Ordinary has no power, by statute or otherwise, to coerce your judgment; and long cohabitation, with habit and repute attached to it, being proved by perfectly uncontradicted and unchallenged testimony, I think your Lordships would have been fully justified in inferring the consent which makes a marriage, according to the usages of Scotland, even if you had not the advantage of finding that inference justified by the unanimous opinion of the learned judges.

The Judge Ordinary sought to be informed as to the presumption of law which, according to the Scottish law, would arise upon the facts in proof. The Dean of Faculty, on behalf of the respondents, here puts the case very strongly: "The presumption is unavoidable," he said, "and therefore, as I say, necessary; and if your Lordships have before you proof of cohabitation, and of habit and repute following on that cohabitation, you *must* declare the persons husband and wife." With that contention the court agreed and found accordingly in favor of the marriage. They could not have done otherwise without setting at naught the highest legal authorities of Scotland. "Marriage," says Erskine⁽¹⁾, "may be entered into when the consent is not express, but is discovered *rebus ipsis et factis*. In this way it is presumed or inferred from cohabitation, or the parties living together at bed and board, joined to their being habited and reputed man and wife." And Stair writes to the same effect: "Cohabitation and behaving as man and wife for a considerable time presumeth marriage, though there be neither contract, promise, nor *spousalia* preceding, nor evidence of copulation by children." And Erskine⁽²⁾ describes a *presumptio juris* as "that which is in general terms established by our decisions as a presumption," "so that it is taken for true only till the contrary shall appear to the judge to be supported by stronger evidence."

[697] *I do not trouble your Lordships by referring again to the cases in Scotland and in this House which fully sustain these expositions of the law. Cohabitation and repute do not constitute the marriage, but are the evidence from which the consent essential to it is conclusively presumed, in the absence of countervailing proof to the contrary. No

(¹) Book I, title 6, sect. 6.

(²) Book IV, chap. ii, sect. 36.

formal solemnization, no agreement by writing or in words, is needful to its validity. If the parties live together for many years as husband and wife, believe themselves to be so, mean themselves to be so, and are reputed to be so, as in this case, by all the world, until the death of one of them, the presumption unrebuted supplies the want of formal ceremony or express contract, and validates their marriage, with all its legal incidents.

I can add nothing of value to what has been said by my noble and learned friends in reply to the argument founded on the void marriage of 1862. The parties were then undoubtedly consenting to the union which both desired, and I am unable to see that there is anything in the case which would justify your Lordships in disregarding the relations maintained by them until the husband's decease and the recognition of their marital *status*, as giving proof of continuing consent, because the acts by which they had striven to demonstrate it, in the first instance, failed of legal operation. They designed to be husband and wife; they demeaned themselves as husband and wife; they were accepted by their neighbors and all who knew them as husband and wife; and the ingenious argument of Mr. Matthews that all this was of no account to raise a presumption of consent because they had made an abortive attempt to marry formally, seems to me quite unsupported by authority, and to have no countenance from the reason of the thing, or from the social policy on which the Scottish law and usage have been based. On this point the judgment of Lord Westbury in the *Breadalbane Case* is very forcible against the appellant.

I am therefore of opinion that the decision of the Judge Ordinary should be sustained, and the appeal dismissed with costs.

LORD SELBORNE: My Lords, the argument for the appellants rested, first, upon a construction of the 7th paragraph of the case stated by the learned *Judge Ordinary for the opinion of the Court of Session, which (in my judgment) was entirely erroneous; and, secondly, upon an attempt to get rid of the legal presumption arising, according to the law of Scotland, from the doctrine of "habit and repute," and to reduce the question of marriage or no marriage, in this case, to one of evidence as to the constitution of a formal marriage *per verba de presenti* at some period subsequent to the 16th of July, 1862.

Upon the first point I am clear that the learned judge did

not state, or intend to state, as a fact, that there was never, after the 16th of July, 1862, any interchange or expressed consent to marry, or acknowledgment with the purpose of contracting a marriage, between William Ellis Wall and Sarah Wall, but that he merely stated that the question, whether there was or was not such interchange, consent, or acknowledgment, was to be treated, for the purpose of the case, as depending solely upon such presumptions or inferences (if any) as the Scottish law would draw from the other facts stated in the preceding paragraphs numbered 5 and 6.

I must add that the facts stated (for the purpose only of the case) in the paragraph numbered 6a, appear to me to be stated very much more favorably for the appellant than was warranted by the evidence before the Judge Ordinary, which did indeed show that the parties whose marriage was in question believed themselves, on the 16th of July, 1862, to have been lawfully married by the ceremony which then took place, but which certainly did not prove that they never afterwards during the lifetime of William Ellis Wall became aware of the legal invalidity of that ceremony: on which point (if material to the result of the case) the burden of proof, in my opinion, rested entirely on the appellant.

I also think that there is no ground for treating the statements in this case as so many findings by the learned Judge Ordinary upon questions of fact. Those statements were made solely for the purpose of obtaining an opinion from the Court of Session as to the conclusions of the law of Scotland upon the hypothesis of the facts so stated. If the evidence which was before the court did not establish that hypothesis 629] of facts on any material point, it *is, in my opinion, the duty of your Lordships now to have regard solely to that evidence and not to the statements in the case.

Taking this view, I entertain no doubt that the conclusion arrived at by the court below, that the children of William Ellis Wall and Sarah Wall were legitimate, was, upon the evidence before the court, and having regard to the law of Scotland, entirely correct.

With respect to the law of Scotland, I apprehend that the argument for the appellants at the bar was at variance with the principle of that law so far as relates to the presumption of marriage from habit and repute. It is indeed true that habit and repute is not, by the law of Scotland, a mode of *constituting*,—it is only a mode of *proving* marriage. It is, however, an error to suppose that what is called habit

and repute is a mere element of proof directed to the establishment of the actual constitution of marriage at some moment of time, supposed to be single and definite, though not precisely ascertained by such mutual declarations as would be necessary for the direct proof of a marriage *per verba de presenti*. Consent to be married persons (it matters not in what manner expressed, nor whether expressed at all, otherwise than tacitly, *rebus et factis*) is all that it is necessary to infer in these cases, from habit and repute—the mutual consent, and not the mode of declaring or interchanging it, being that which, by the law of Scotland, constitutes marriage. When a true and undivided habit and repute of marriage is shown, a presumption of that marriage from that habit and repute at once arises by the law of Scotland. It is true that this presumption may be rebutted; but the *onus* of rebutting it is thrown by the law (as I understand it) on those whose interest it is to deny the marriage. Nor does this presumption rest on decided cases, or on the authority of the great text-writers of the Scottish law only. It is expressly recognized and confirmed by the statute of Jac. 4, c. 77, of 1503, which was mentioned during the argument at the bar. That statute relates immediately to the claims of widows to their tierce; but it is manifest that the presumption which holds in the case of the widow's tierce must hold equally in the case of the children's legitimacy. The question in the present case arose in the exact state of circumstances contemplated by the statute, *viz., after the death of the reputed husband, the marriage never having been challenged during his lifetime. In that state of circumstances the statute says: "It is statute and ordained *anent the exceptions* proponed against widows, pursuing and following their benefices of tierce, or the profit of their tierce, *which is oftentimes proponed against those widows, that they were not lawful wives to the persons their husbands, by whom they follow their said tierce.* That, therefore, *where the matrimony was not accused in their lifetimes, and that the woman asking this tierce being repute and holden as his lawful wife in his lifetime, shall be tierced and brook her tierce without any impediment or exceptions to be proponed against her, until it be clearly decerned and sentence given that she was not his lawful wife,* and that she should not have a lawful tierce therefor;" distinctly, therefore, by statute throwing, in all such cases, the *onus* of proof upon the persons who deny the marriage. In my opinion, therefore, it would have been

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entirely contrary to the presumption of Scotch law, and a great miscarriage of justice, if the legitimacy of the children had not been established upon the evidence in this case.

Decree appealed from affirmed, and appeal dismissed with costs.

Agent for the Attorney-General: *E. L. Rowcliffe.*

Agents for the appellant: *Vallance & Vallance.*

Agents for the respondents: *Tatham, Procter, Tatham & Procter*, London; and *Thomas Barneby*, Worcester.

See 11 Eng. Rep., 711 note.

The general rule of law is, that a marriage valid where it is celebrated is valid everywhere, but the converse of this is equally general, that a marriage void where it is celebrated is void everywhere: *Hutchins v. Kimmell*, 31 Mich., 126; *Cargile v. Wood*, 63 Mo., 501.

See *Emerson v. Shaw*, 56 N. H., 418.

As to what is a valid marriage and from what one may be inferred: See *Dickerson v. Brown*, 49 Miss., 357; *Rundle v. Pegram*, 49 Miss., 751.

As to what is not: *Stewart v. Robertson*; 18 Eng. R., 165.

As to the effect of a constitutional provision that all parties living in adulterous intercourse, who continue after its adoption to live together, being held to be husband and wife and their issue legal: See *Dickerson v. Brown*, 49 Miss., 357; *Rundle v. Pegram*, 49 Miss., 751.

Evidence that parties appeared at a church, that the officiating minister publicly and in the presence of other persons in attendance, in fact performed a ceremony of marriage between such parties, and that the latter appeared to regard themselves as then married, will raise a presumption in the absence of any evidence to the contrary, that the ceremony was regular and legal, though there be no proof of the particulars of the ceremony, or of the specific requisites of a lawful ceremony according to the forms and usages or customs of such church: *People v. Calder*, 30 Mich., 85; *Hutchins v. Kimmell*, 31 Mich., 126.

Nor is it necessary to prove that the clergyman who performed the ceremony was duly authorized: *Baker v. Wilson*, 8 Grant's (U. C.) Chy., 376.

A separation deed executed by the deceased husband, wherein he acknowl-

edged the plaintiff as his wife, with proof of payments made to her under it, and a certified copy of registry of marriage from the parish registry in Ireland, is sufficient evidence of marriage: *Craig v. Templeton*, 8 Grant's (U. C.) Chy., 483.

But where the plaintiff, in ejectment, put in evidence a will, in which the testator spoke of H. as his wife, held he was not estopped from denying the marriage: *George v. Thomas*, 10 Upper Can. Q. B., 604.

On a question of legitimacy the declarations of a father that his son was illegitimate are competent evidence: *Barnum v. Barnum*, 43 Md., 253.

Certificates which are sufficient to prove the performance of a ceremony of marriage in a foreign country, *prima facie* establish a marriage, and the admission of such certificates in evidence, without proof of the foreign law, is not error: *Hutchins v. Kimmell*, 31 Mich., 126.

Marriage may, in most civil cases, be proved by cohabitation and reputation: *Beatty v. Beatty*, 17 U. C. Com. Pl., 484; *Losee v. Murray*, 24 U. C. Q. B., 586; *Phipps v. Moore*, 5 U. C. Q. B., 16; *Baker v. Wilson*, 8 Grant's (U. C.) Chy., 376; *Illinois, etc., v. Benner*, 75 Ills., 315.

See *Emerson v. Shaw*, 56 N. H., 418.

Seduction or *crim. con.* is an exception to the rule: *Barnum v. Barnum*, 42 Md., 252.

If a contract of marriage be made *per verba de presenti*, it is sufficient evidence of a marriage, or if it be made *per verba de futuro cum copula*, the *copula* is presumed to have been allowed on the faith of the marriage promise. The parties at the time of the *copula* accept of each other as man and wife.

This is merely a rule of evidence, and it is always competent in such cases to show by proof that the fact was otherwise.

The conduct of the parties in introducing each other as, and calling each other, husband and wife, when considered in connection with the other evidence, may and frequently does prove only a desire to avoid the danger and odium to which they would have been exposed if the truth had been known: *Port v. Port*, 7 Chicago Leg. News, 158, Supreme Court, Illinois, not yet reported in regular series.

When reputation is relied on to prove marriage, that reputation, to raise the presumption of marriage, must be founded on general, not divided or singular opinion; and where reputation in such case is divided it amounts to no evidence at all. And so with respect to the declaration of the parties; the value of such declarations as evidence will always depend upon the circumstances under which they were made: *Barnum v. Barnum*, 42 Md., 252.

The presumption of marriage arising from reputation may be rebutted by proof that the woman formerly lived with another man in such a manner as to raise the same presumption of marriage with him: *George v. Thomas*, 10 Upper Can. Q. B., 604.

To change an adulterous intercourse into the state of matrimony requires something more, to give expression and acceptance of the new state, than the mere continuance of the intercourse, after all the difficulties in the way of marriage are removed: *Rundle v. Pegram*, 49 Miss., 751; *Cargile v. Wood*, 63 Mo., 501, 514; *Clayton v. Wardell*, 4 N. Y., 230; *Cajouille v. Ferrie*, 23 N. Y., 90, 95; *Stewart v. Robertson*, 13 Eng. Rep., 165.

But see *Cajouille v. Ferrie*, 23 N. Y., 90, 95; *O'Gara v. Eisenlohr*, 38 N. Y., 300-304.

A cohabitation, illicit in its origin, is presumed to continue to be of that character unless the contrary be proved, and cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage. Such contract may be proved by circumstances, but they must be such as to exclude

the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of actual marriage by mutual consent. The presumption of a contract of marriage cannot be raised when the direct consequence of it would be to involve both parties, by a subsequent marriage, in the crime of bigamy: *Foster v. Hawley*, 8 Hun, 68.

In Maryland it has been held that where an illicit connection has once existed, it is incumbent upon those who set up subsequent marriage between the parties, to show when and where it occurred; and having undertaken to prove that a valid marriage was celebrated at a particular time and place, the parties cannot be permitted, if the evidence should be insufficient to establish such marriage, to rely upon other facts and circumstances as the ground of presumption that a marriage may have taken place between the parties at some other and different time and place from that testified to by the witnesses; the presumption in such case being that the connection between the parties continued to be illicit, until the presumption is overcome by distinct proof of marriage: *Barnum v. Barnum*, 42 Md., 252.

In 1825, two slaves, who, owing to their being such, could not procure the necessary license to marry, went through the ceremony of marriage by a Baptist minister. They lived together as man and wife at Richmond, till 1833, when the husband escaped to New York and there married another woman. It was proved that by the laws of Virginia, until 1866, slaves were incapable of marrying; that to constitute a strictly legal marriage between free persons a license was essential; but slaves could not obtain it or in any way contract a legal marriage, being regarded by the law as property only and not persons. It was contended that the parties having done all in their power to make their marriage binding, it should be held valid in Canada, the only impediment to its validity in Virginia, arising from the law of slavery, which the Canadian law could not recognize: Held otherwise; for the parties not being British subjects, as in *Reading v. Smith*, 2 Hagg. Const. Rep., 385, the validity of the marriage must,

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according to the general rule, be determined by the law of the country where it was celebrated: Harris v. Cooper, 81 Upper Can. Q. B., 182.

As to marriage by a white man to

an Indian woman, see Johnstone v. Connolly, 1 Lower Canada Revue Légale, 253, 314, 324-396, an exhaustive and interesting case not reported in the regular series.

[1 Appeal Cases, 701.]

H.L. (Sc.), May 22, 1876.

[HOUSE OF LORDS.]

701] *RAMSAY *et al.*, Appellants; BLAIR, Respondent.

Grants reserving Minerals.

Case in which three grants of land, reserving the minerals, but each reservation varying in substance and expression, were held to have respectively secured, and not to have secured, a right to carry outside minerals underneath and through the land granted.

Remarks by Lord Chelmsford and Lord Selborne as to the question whether the rights reserved were rights of property, or rather in the nature of privileges, servitudes, or easements.

In this case the suit was instituted by Mr. Blair against Mr. Ramsay of Tilliecultry and the Alloa Coal Company, to prevent them from carrying their coal works under Mr. Blair's lands, forming portions of the Tilliecultry estate, which had come to him at different periods from the Ramsay family, as superiors thereof.

The defence of Mr. Ramsay and of the Alloa Coal Company was that in the grants to Mr. Blair there were reservations which entitled them not only to work the coal under Mr. Blair's land, but also to make and use passages through it for the transmission of coals lying outside and beyond his boundaries.

Mr. Blair had three distinct grants of contiguous parcels of land, with reservations of the coal underneath. In 1825, one parcel was granted "reserving the coals and coal-heughs." In 1857, another parcel was granted "reserving the coal, with power to dig for, work, and carry away the same, on paying the surface damage."

A much larger retention appeared in the grant of 1827, the reservation "specifying the whole coal, stone quarries, and all other metals and minerals within the said land and with power to search for, work, and carry away the same, paying all damages."

The Lord Ordinary⁽¹⁾ decided as to the grants of 1825 702] and *1857, that the appellants had no right to carry outside coal or other minerals through the respondent's lands, whether below or above ground, except through coal wastes, or through the land granted with the large

(¹) Affirming Scotch Cases, 4th Series, vol. 3, p. 25. (²) Lord Mackenzie.

reservation of 1827. The Second Division confirmed the Lord Ordinary's decision ('); and thereupon Mr Ramsay and the Alloa Company appealed to the House, having for their counsel Mr. *John Pearson*, Q.C., and Mr. *Cotton*, Q.C.

Mr. *Southgate*, Q.C., and Mr. *E. Kay*, Q.C., appeared for the respondent.

At the close of the argument on behalf of the appellants, the following opinions were delivered by the Law Peers:

LORD CHELMSFORD: My Lords, it seems to me, as I believe it seems to your Lordships, that there is no difficulty whatever in this case, and that there is no necessity to hear the counsel for the respondent.

The simple question arises upon three grants with reservations made by the appellant, Mr. Ramsay of Whitehill. These grants were made in 1825, 1827, and 1857. The first, that of 1825, contained this proviso: "Reserving always to me, my heirs and successors, the coals and coal-heughs, all of the said haill lands to be won and disposed upon by me and my foresaids at our pleasure."

The grant of 1857 is said to be practically in the same terms; the reservation is "Excepting always the coal within the said several subjects to the said James Blair, which coal is hereby expressly reserved to the said Robert Balfour Wardlaw Ramsay, with full power to him to dig for, work, win, and carry away the same, on paying the surface damages which the ground may thereby sustain."

With regard to those grants, there can be no doubt at all that the only reservation is of the coal under the surface, and the grantor would have no power whatever to carry under those lands any coals or minerals won and worked from any other lands.

The reservation in the grant of 1827 is more extensive. It is: "Reserving always to the said Robert Wardlaw Ramsay and his heirs and *successors the whole coal, [703 stone quarries, and all other metals and minerals within the said three acres of the lands hereby disposed, with power to search for, work, and carry away the same, they always paying to the said James Blair and his foresaids all damages."

Undoubtedly under that grant the whole of the land under the surface, all the coals, and all the metals and minerals, were reserved to the grantor, and it gave him a right of course as upon his own property to make any way for any coals or other minerals that he might have in any other part of his lands. But in this case he could not use that power,

(') Scotch Cases, 4th Series, vol. iii, p. 25.

because there were barriers on either side which prevented access to that underground by reason of the grants of 1825 and 1857.

My Lords, the judges have been unanimous on this subject, and are of opinion that Mr. Ramsay had no power whatever to use the underground of the lands reserved for the purpose of carrying away coals or minerals from any other lands which were not granted.

I cannot help observing that I think Lord Ormidale, in giving judgment in this case, has stated that which is not perfectly correct, because he says that the reserved right to work and carry away the coal was not of the nature of a proprietary right, but rather of the nature of a "privilege, servitude, or easement." Now, it appears to me, that being upon a grant or reservation of minerals, *prima facie* it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted, or reserved, as a necessary incident. As was said by Lord Wensleydale in the case of *Rowbotham v. Wilson*⁽¹⁾: "It is one of the cases put by Sheppard's Touchstone in illustration of the maxim, '*Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*,' that by a grant of mines is granted the power to dig them." This power to dig would of course be futile, unless it involved the right of bringing to the surface. A necessary incident to a grant cannot therefore, in my opinion, be styled a "privilege, servitude, or easement."

I think the matter is perfectly clear, and I move your Lordships that the interlocutor of the Court of Session be affirmed.

704] *LORD HATHERLEY: My Lords, I am entirely of the same opinion.

In the case of the *Duke of Hamilton v. Graham*⁽²⁾ it was clearly pointed out what the exact right of a proprietor was in respect of a property excepted from a demise; and as to which therefore all the original rights of the demising proprietor remained, together with all the incidents to that property necessary to its working and enjoyment, that which the owner has reserved to himself being as much his as other parts of his land of which he has made no demise whatever. In the Duke of Hamilton's case it did not appear from the evidence that he was exceeding that right; it did not appear that he was using for any purpose whatsoever anything but that portion of the mineral property which he had actually reserved, and over which he had

⁽¹⁾ 8 H. L. C., 360. ⁽²⁾ Law Rep., 2 H. L., Sc. & Div. App. Ca., p. 166.

entire and complete *domininm*; and, therefore, it was held that he was not transgressing his own grant or departing in any way from it. But as respects the power of working, whether incidental to the reservation of the property, or expressly specified in the instrument, no right of property is attached to that—it is simply a right of availing yourself of that property which you have reserved to yourself in the lands in question.

Now the right which has been reserved in this case is only a right to the coals under the lands which have been parted with; that is to say, a right to the portion of the coal situated under the surface demised to the respondent; and nothing can be done beyond the purpose of working the coal under the respondent's lands and no other coal. That really seems to me, my Lords, the simple principle upon which the court has proceeded; and as to the question of interpretation, I do not see how we can give to the words "coal and coal-heughs" (whatever coal-heughs may mean) any interpretation going such a length that it would amount to a reservation of all the wastes between the different seams of coal in these lands. As regards the intervening piece of land demised by the grant of 1827, the reservation is more extensive. The reservation there is of "the whole coal, stone quarries, and all other metals and minerals within the" lands demised, "with power to search for, *work, and carry away the same." If those [705 who advised Mr. Ramsay with regard to the granting of his leases, had happily thought of drawing the other two leases in the same form, it is possible that he might have found himself in a more favorable position; but as things stand I have no hesitation in coming to the conclusion that the respondent is right; and that the appeal ought to be dismissed.

LORD SELBORNE: My Lords, the question seems to me to be a very simple one, both in fact and in law.

The engineer, Mr. Simpson, finds in the report, which is the only evidence as to the facts, that the level cross-cut which he speaks of by the word "mine" "runs under the pursuer's lands partly in the Cherry coal waste and Splint coal waste, and partly in other strata," and that the strata through which the mine passes other than the coal consist chiefly of shale and sandstone. The interlocutors under appeal have recognized the right of the appellant to carry through the coal and the coal wastes whatever he is able to carry through them without any interference on the part of the pursuer, but have denied him that right as to the

other strata, stated here to consist chiefly of shale and sandstone. The only possible question that I can see is, whether by the grants of the two feus of 1825 and 1851 those other strata of shale and sandstone passed in fee to the feuar, who was the pursuer in the action, or were reserved and excepted in favor of the appellant.

Looking at the terms of the grants I can see no ground whatever for raising so much as a doubt that those other strata of shale and of sandstone passed to the feuar, and were not reserved or excepted in favor of the appellants. In the first grant the only thing excepted is whatever is properly described by the words "coals and coal-heughs." The expression "coal-heughs" is interpreted to mean coal pits. As there were no open pits at that time under this land, I take that as equivalent to coal mines; but coals and coal mines mean, I apprehend, when unopened mines are spoken of, nothing more nor less than the veins or seams of coal underlying the surface. Whatever he can do within the limits of those veins or seams, whether before or after 706] their exhaustion by *working, is still permitted to him by these interlocutors, and the question arises solely as to the other strata, which are neither coals nor coal mines. With respect to the third grant, there is even less apparently upon which the argument can be founded than in the first, because the words "coal-heughs" are not there, but only "the coal."

My Lords, I must take the liberty of saying that I think Lord Ormisdale was not so far wrong in the language which he used. No doubt the right to work coal which is reserved under land otherwise granted is a right connected with property in the person who makes the reservation in his own favor, and not like an easement in gross, something independent of, something unconnected with the reserved property. Still, so far as it is a right to be exercised not within the *solum* which is reserved, but over and through the *solum* which is granted, I cannot but think that Lord Ormisdale was justified in describing it by the words "privilege, servitude, or easement."

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Agents for the appellants: *Holmes, Anton, Greig & White.*
Agents for the respondent: *Grahames & Wardlaw.*

See 16 Eng. Rep., 384 note; Washburn on Easements, tit. Mines; Washburn on Real Property, tit. Mines; Bainbridge on Mines and Minerals; Rogers'

Law of Mines; Blanchard & Weeks' Law of Mines and Minerals; Morrison's Digest of Mining Decisions.

C A S E S

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE,

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE QUEEN'S BENCH DIVISION,

AND BY THE

COURT FOR CROWN CASES RESERVED,

XXXIX VICTORIA.

[1 Queen's Bench Division, 410.]

April 25, 1876.

*POUSSARD V. SPIERS & POND.

[410]

Contract for personal Services—Engagement to perform in a new Opera—Ability to perform on first Night—Condition precedent—Right to Rescind.

The plaintiff agreed in writing with the defendants to sing and play in the chief female part in a new opera about to be brought out at the defendants' theatre, at a weekly salary of £11 for three months, provided the opera ran for that time, commencing on or about the 14th of November. The first performance was announced for Saturday, the 28th of November, and no objection was raised by plaintiff as to this delay. She attended several rehearsals, such attendance, though not expressed in the written engagement, being an implied part of it. Owing to delays of the composer, the music of the latter part of the opera was not in the hands of defendants till a few days before the 28th of November, and the final rehearsals did not take place till the beginning of the last week. Plaintiff was taken ill, and was unable to attend any of the rehearsals in that week; and, it being uncertain how long her illness might continue, defendants' manager made a provisional engagement with another artiste, Miss L., to study the part and be ready to take it if the plaintiff was unable. If she was not wanted, Miss L. was to receive a *douceur*; if she was called on to perform, she was to receive £15 a week till the 25th of December, if the piece ran so long. The plaintiff continued too ill to attend the rehearsals or the first performance on Saturday, the 28th of November, or on the first three days of the next week; Miss L. accordingly performed on those days. On Thursday, the 4th of December, the plaintiff was well enough to perform and tendered her services, which the defendants refused to accept; on which she brought an

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action for wrongful dismissal. The jury found, *inter alia*, that the employment of Miss L. by the defendants under the circumstances was reasonable :

Held, that the plaintiff's inability to perform on the opening and early performances went to the root of the matter, and justified the defendants in rescinding the contract.

DECLARATION on an agreement by the defendants to employ the plaintiff's wife to sing and play in an opera at the defendants' theatre. Breach, that the defendants refused to allow the plaintiff's wife to perform according to the agreement.

Pleas: 1. That defendants did not agree as alleged. 2. That plaintiff's wife was not ready and willing to perform. 3. That plaintiff rescinded the contract before breach. Issue joined.

At the trial before Field, J., at the Middlesex Michaelmas sittings, 1875, judgment was entered for the defendants, with leave to move to enter judgment for the plaintiff for £83.

A notice of motion was given accordingly, and a cross order was obtained by the defendants for a new trial, on the ground that the verdict was against the weight of evidence, and that the damages were excessive.

The facts proved and the course of the trial are fully given in the judgment of the court.

Feb. 21. *Percy Gye*, for the plaintiff, cited *Cuckson v. Stones* ('); *Simpson v. Crippin* ('); *Tilley v. Thomas* (').

Parry, Sergt. (with him *F. H. Lewis*), for the defendants, cited *Bettini v. Gye* (') and *Graves v. Legg* (').

Cur. adv. vult.

April 25. The judgment of the court (Blackburn, Quain and Field, JJ.) was delivered by

BLACKBURN, J.: This was an action for the dismissal of the plaintiff's wife from a theatrical engagement. On the trial before my Brother Field it appeared that the defendants, Messrs. Spiers & Pond, had taken the Criterion Theatre, and were about to bring out a French opera, which was to be produced simultaneously in London and Paris. Their manager, Mr. Hingston, by their authority, made a contract with the plaintiff's wife, which was reduced to writing in the following letter:

"*Criterion Theatre, October 16th, 1874.*

"To Madame Poussard.

"On behalf of Messrs. Spiers & Pond I engage you to sing and play at the Criterion Theatre on the following terms:

(1) 1 E. & E., 248; 28 L. J. (Q.B.), 25.

(*) Ante, p. 183.

(2) Law Rep., 8 Q. B., 14.

(*) 9 Ex., 709; 23 L. J. (Ex.), 228.

(3) Law Rep., 3 Ch. Ap., 61.

"You to play the part of Friquette in Lecoq's opera of *Les Pres Saint Gervais*, commencing on or about the fourteenth of November next, at a weekly salary of eleven pounds (£11), and to continue on at that sum for a period of three months, providing the opera shall run for that period. Then, at the expiration of the said three months, I shall be at liberty to re-engage you at my option, on terms then to be arranged, and not to exceed fourteen pounds per week for another period of three months. Dresses and tights requisite for the part to be provided by the *management, and the engagement to be subject [412 to the ordinary rules and regulations of the theatre.

"Ratified :

E. P. HINGSTON, Manager.

"Spiers & Pond.

"Madame Poussard, 46 Gunter Grove, Chelsea."

The first performance of the piece was announced for Saturday, the 28th of November. No objection was raised on either side as to this delay, and Madame Poussard attended rehearsals, and such attendance, though not expressed in the written engagement, was an implied part of it. Owing to delays on the part of the composer, the music of the latter part of the piece was not in the hands of the defendants till a few days before that announced for the production of the piece, and the latter and final rehearsals did not take place till the week on the Saturday of which the performance was announced. Madame Poussard was unfortunately taken ill, and though she struggled to attend the rehearsals, she was obliged on Monday, the 23d of November, to leave the rehearsal, go home and go to bed, and call in medical attendance. In the course of the next day or two an interview took place between the plaintiff and Mr. Leonard (Madame Poussard's medical attendant) and Mrs. Liston, who was the defendants' stage manager, in reference to Madame Poussard's ability to attend and undertake her part, and there was a conflict of testimony as to what took place. According to the defendants' version, Mrs. Liston requested to know as soon as possible what was the prospect of Madame Poussard's recovery, as it would be very difficult on such short notice to obtain a substitute ; and that in the result the plaintiff wrote stating that his wife's health was such that she could not play on the Saturday night, and that Mrs. Liston had better, therefore, engage a young lady to play the part ; and this, if believed to be accurate, amounted to a rescission of the contract. According to the evidence of the plaintiff and the doctor, Mrs. Liston told them that Madame Poussard was to take

care of herself and not come out till quite well, as she, Mrs. Liston had procured, or would procure, a temporary substitute; and Madame Poussard could resume her place as soon as she was well. This, it was contended by the plaintiff, amounted to a waiver by the defendants of a breach of the condition precedent if there was one.

413] *The jury found that the plaintiff did not rescind the contract, and that Mrs. Liston, if she did waive the condition precedent (as to which they were not agreed), had no authority from the defendants so to do.

These findings, if they stand, dispose of those two questions.

There was no substantial conflict as to what was in fact done by Mrs. Liston. Upon learning, on the Wednesday (the 25th of November), the possibility that Madame Poussard might be prevented by illness from fulfilling her engagement, she sent to a theatrical agent to inquire what artistes of position were disengaged, and learning that Miss Lewis had no engagement till the 25th of December, she made a provisional arrangement with her, by which Miss Lewis undertook to study the part and be ready on Saturday to take the part, in case Madame Poussard was not then recovered so far as to be ready to perform. If it should turn out that this labor was thrown away, Miss Lewis was to have a *douceur* for her trouble. If Miss Lewis was called on to perform, she was to be engaged at £15 a week up to the 25th of December, if the piece ran so long. Madame Poussard continued in bed and ill, and unable to attend either the subsequent rehearsals or the first night of the performance on the Saturday, and Miss Lewis's engagement became absolute, and she performed the part on Saturday, Monday, Tuesday, Wednesday, and up to the close of her engagement, the 25th of December. The piece proved a success, and in fact ran for more than three months.

On Thursday, the 4th of December, Madame Poussard, having recovered, offered to take her place, but was refused, and for this refusal the action was brought.

On the 2d of January Madame Poussard left England.

My Brother Field, at the trial, expressed his opinion that the failure of Madame Poussard to be ready to perform, under the circumstances, went so much to the root of the consideration as to discharge the defendants, and that he should therefore enter judgment for the defendants; but he asked the jury five questions.

The first three related to the supposed rescission and waiver. The other questions were in writing and were:

4. Whether the non-attendance on the night of the opening was of such material *consequence to the defendants [414 as to entitle them to rescind the contract? To which the jury said, "No." And, 5, was it of such consequence as to render it reasonable for the defendants to employ another artiste, and whether the engagement of Miss Lewis, as made, was reasonable; to which the jury said "Yes." Lastly, he left the question of damages, which the jury assessed at £83.

On these answers he reserved leave to the plaintiff to move to enter judgment for £83.

A cross rule was obtained on the ground that the verdict was against evidence and that the damages were excessive.

We think that, from the nature of the engagement to take a leading, and, indeed, the principal female part (for the prima donna sang her part in male costume as the Prince de Conti) in a new opera which (as appears from the terms of the engagement) it was known might run for a longer or shorter time, and so be a profitable or losing concern to the defendants, we can, without the aid of the jury, see that it must have been of great importance to the defendants that the piece should start well, and consequently that the failure of the plaintiff's wife to be able to perform on the opening and early performances was a very serious detriment to them.

This inability having been occasioned by sickness was not any breach of contract by the plaintiff, and no action can lie against him for the failure thus occasioned. But the damage to the defendants and the consequent failure of consideration is just as great as if it had been occasioned by the plaintiff's fault, instead of by his wife's misfortune. The analogy is complete between this case and that of a charterparty in the ordinary terms, where the ship is to proceed in ballast (the act of God, &c., excepted) to a port and there load a cargo. If the delay is occasioned by excepted perils, the shipowner is excused. But if it is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo: see per Bramwell, B., delivering the judgment of the majority of the Court of Exchequer Chamber in *Jackson v. Union Marine Insurance Co.* (1).

And we think that the question, whether the failure of a skilled and capable artiste to perform in a new piece through serious *illness is so important as to go to the root [415 of the consideration, must to some extent depend on the

(1) Law Rep., 10 C. P., at p. 141.

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evidence; and is a mixed question of law and fact. Theoretically, the facts should be left to and found separately by the jury, it being for the judge or the court to say whether they, being so found, show a breach of a condition precedent or not. But this course is often (if not generally) impracticable; and if we can see that the proper facts have been found, we should act on these without regard to the form of the questions.

Now, in the present case, we must consider what were the courses open to the defendants under the circumstances. They might, it was said on the argument before us (though not on the trial), have postponed the bringing out of the piece till the recovery of Madame Poussard, and if her illness had been a temporary hoarseness incapacitating her from singing on the Saturday, but sure to be removed by the Monday, that might have been a proper course to pursue. But the illness here was a serious one, of uncertain duration, and if the plaintiff had at the trial suggested that this was the proper course, it would, no doubt, have been shown that it would have been a ruinous course; and that it would have been much better to have abandoned the piece altogether than to have postponed it from day to day for an uncertain time, during which the theatre would have been a heavy loss.

The remaining alternatives were to employ a temporary substitute until such time as the plaintiff's wife should recover; and if a temporary substitute capable of performing the part adequately could have been obtained upon such a precarious engagement on any reasonable terms, that would have been a right course to pursue; but if no substitute capable of performing the part adequately could be obtained, except on the terms that she should be permanently engaged at higher pay than the plaintiff's wife, in our opinion it follows, as a matter of law, that the failure on the plaintiff's part went to the root of the matter and discharged the defendants.

We think, therefore, that the fifth question put to the jury, and answered by them in favor of the defendants, does find all the facts necessary to enable us to decide as a matter of law that the defendants are discharged.

416] *The fourth question is, no doubt, found by the jury for the plaintiff; but we think in finding it they must have made a mistake in law as to what was a sufficient failure of consideration to set the defendants at liberty, which was not a question for them.

This view taken by us renders it unnecessary to decide anything on the cross rule for a new trial.

The motion must be refused with costs.

Motion refused with costs.

Solicitors for plaintiff: *Lumley & Lumley.*

Solicitors for defendants: *Lewis & Lewis.*

In *Gilbert R. Spaulding et al., v. Carl Rosa, et al.*, the defendants had agreed with the plaintiffs, the proprietors of the Olympic Theatre at St. Louis, that the Wachtel opera troupe consisting of sixty-five persons should give four performances per week at the plaintiffs theatre for two weeks commencing Feb. 26th or 27th, 1873. The plaintiffs' to furnish the theatre, coupon tickets, ushers, door-keepers, carpenters, stage hands, supers, ballet-girls, properties, twelve orchestral performers, advertise in German and English papers, posters, etc. The plaintiffs were to receive 20 per cent. of the receipts but not to exceed \$1,800 per week. The defendants to receive the residue. The plaintiffs were ready and willing to perform the agreement but the defendants failed to perform it, alleging as a defence that Wachtel the leading tenor singer a few days prior to the time for commencing the performances was taken with a cold which incapacitated him from singing; that he was the star of the troupe and that without him they could not make sufficient to pay the expenses. That for this reason the troupe did not go to St. Louis and defendants were excused for failure to perform the agreement. The sickness was probably produced by the defendants taking Wachtel from place to place, from cold to warm climates, and from exposure to the smoky atmosphere of Pittsburgh, Pa. The performance to be given consisted of several parts, "prima donna, baritone, bass, chorus and orchestra." It was a dramatic musical scale performance carried on by "singers, orchestra, partly speaking and partly singing, the orchestra making the accompaniment to it." Wachtel was the only tenor singer. He was to have 40 per cent. of defendants' receipts as his price. The plaintiffs offered to defendants to have the troupe come on without Wachtel and take 40 per cent. instead of 20

under the contract, giving to the defendants 60 per cent. instead of 80. Defendants refused to do so on the ground that it would not pay, and remained in Chicago. The Supreme Court of New York (Binghamton General Term, May, 1876), held the sickness of Wachtel was the act of God and a valid excuse for non-performance by the defendants. The Court of Appeals affirmed the case: 16 Alb. Law Jour., 370.

Where by the terms of an agreement between the plaintiff (an actor) and the defendant (a theatrical manager) it was agreed that the plaintiff should between Oct. 9, 1854, and June 1st, 1855, perform as an actor for the defendant for four terms of four weeks each, and that there should be an interval of four weeks between the terms, the commencement of each term to be appointed by the defendant, and notice thereof given to the plaintiff. They subsequently agreed that the plaintiff should not perform in January or February, 1855. The plaintiff commenced playing about Oct. 9, 1854. Before the end of the second week it was agreed, at his request, that such first term of four weeks should be divided into periods of two weeks each, the plaintiff to discontinue playing at the end of said first two weeks, then leave and return and play the other two weeks so as to complete the same on or about the 1st of January, 1855. The plaintiff left at the end of the first two weeks, and did not again return or offer to return. He was not requested, by defendant, to return: Held, 1. That the plaintiff was bound by the agreement, as modified, to return and play, or offer to play, said remaining two weeks, without any notice or request from the defendant so to do; that the plaintiff's failure to do so was a breach of the agreement on his part, and that he was liable to the defendant for the damages resulting therefrom. 2. That after

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such breach by the plaintiff of the agreement on his part, the defendant was under no obligation to employ the plaintiff further, and that no action would lie against the defendant for not having notified the plaintiff of the time of commencing other terms of four weeks each, and for not furnishing him employment for such terms, although the plaintiff might have been ready and willing to perform on being so notified: *Placide v. Burton*, 4 Bosw., 512.

See *Daly v. Smith*, 38 N. Y. Superior Court Rep., 158.

A court of equity cannot compel an actor or singer specifically to perform a contract to do so: *Sanquerico v. Beditti*, 1 Barb., 315; *Haight v. Badgley*, 15 Barb., 499; *Lumley v. Gye*, 2 Ell. & Bl., 216, 75 Eng. Com. Law Rep.

It will, however, restrain him from doing so elsewhere, in the vicinity, than at a place where he has contracted to perform or sing, if the contract contain an agreement not to do so elsewhere: *Kerr on Inj.* (1st Am. ed.), 521, 527, marg. p.; *Webster v. Dillon*, 3 Jur., N.S., 432, 6 Am. Law Reg., O.S., 174; *Fredericks v. Mayor*, 13 How. Pr., 566, 1 Bosw., 227; *De Pol v. Solke*, 7 Rob., 280; *Fechter v. Montgomery*, 33 Beav., 22 and note to case; *Lumley v. Wagner*, 1 De Gex, Macnaghten & Gordon, 604, 619, 13 Eng. Law and Eq. Rep., 252; *Hayes v. Willio*, 11 Abb. Pr., N.S., 167.

It has been held otherwise if the contract contain no such agreement: *Butler v. Galletti*, 21 How. Pr., 465.

The contrary has also been held and is probably the sound doctrine: *Daly v. Smith*, 38 N. Y. Superior Court

Rep., 158, 49 How. Pr., 150, distinguishing many cases; *Montague v. Flockton*, 6 Eng. Rep., 704; *Joyce's, Principles of Inj.* (1st. Eng. ed.), 280.

So it has been held that an injunction against an actor's playing would not be issued if plaintiff have no theatre from which custom may be drawn: *De Pol v. Solke*, 7 Rob., 280.

So also where the defendant agreed with a theatrical company to give them his services as an actor for a specified term, and agreed not to give his services elsewhere without their written permission. The agreement contained a stipulation to the effect that if he should break his engagement, he obligated himself to pay to the company a conventional fine of \$200, to be forfeited by any violation of the contract; and then provided as follows: "This sum of \$200 is already forfeited by any violation of the contract, and requires no particular legal proceedings for its execution." On a bill for an injunction, filed by the company against the defendant to restrain him from performing at another theatre: Held, that the complainants having fixed, by their own estimate, the extent of injury they would suffer from a non-observance of this condition in the contract, and having indicated that the only form in which they could seek redress, and recover the stipulated penalty or forfeiture, was a court of law, were precluded from resorting to a court of equity for relief by way of injunction, on the ground that a violation of this part of the contract would result in irreparable injury to them: *Hahn v. The Concordia Society*, 43 Maryland, 460, reviewing several cases.

[1 Queen's Bench Division, 436.]

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*PHILLIPS V. BARNET.

Husband and Wife—Effect of Divorce—Wife suing Husband after Divorce for Assault during Coverture.

A wife after being divorced from her husband cannot sue him for an assault committed upon her during coverture.

Declaration, that the defendant assaulted and beat the plaintiff. Plea, that at the time of the committing of the grievances, &c., the plaintiff was the wife of the defendant. Replication, that before suit the marriage of the plaintiff and the defen-

dant was dissolved by the absolute decree of the Court for Divorce and Matrimonial Causes. On demurrer:

Held, that the replication was bad: for that the action did not lie, as the wife's inability to sue did not arise merely from the necessity of joining her husband in an action for an assault, but from the rule that husband and wife are one person in law.

DECLARATION, that defendant assaulted and beat plaintiff, by means of which plaintiff became permanently injured in health, and was put to expense for medical and other assistance.

Third plea, that at the time of the committing of the grievances complained of, plaintiff was the wife of defendant.

Replication, that before suit the marriage of plaintiff and defendant was dissolved by the absolute decree of the Court for Divorce and Matrimonial causes.

Demurrer and joinder in demurrer.

C. Russell, Q.C. (*G. Browne* with him), in support of the demurrer: The third plea is good and the replication bad. No action will lie at the suit of a wife against her husband for injuries which he has inflicted upon her during the marriage, and though the marriage be afterwards dissolved, she has no statutory power to sue him for such injuries. It has long been settled that in an action for an assault on the wife, both husband and wife must join: *Westbrooke v. Strutville* (1); *Dickenson v. Davis* (2); Com. Dig., Baron and Feme (V); Blackstone's Commentaries, Hargreave's ed., vol. i, p. 444. The Divorce Act, 20 & 21 Vict. c. 85, ss. 25, 26, shows that the effect of a decree for divorce or judicial separation is not retrospective, and in *Midland Ry. Co. v. Pye* (3), it was distinctly held [437 that a married woman could not maintain an action for injuries to property before the date of a protection order under s. 21. The disability of the wife arises from the rule that she and her husband are one person in law.

[BLACKBURN, J.: It appears, however, to be at least doubtful, whether the non-joinder of the wife is ground for a plea in abatement or in bar.]

The husband cannot be compelled to join, he is *dominis litis*, and the wife, even though pleas in abatement are abolished, cannot bring such an action as this.

[FIELD, J.: In *Wenman v. Ashe* (4), Maule, J., says, that for many purposes husband and wife are essentially distinct and different persons.]

(1) 1 Str., 79.

(2) 1 Str., 480.

(3) 10 C. B. (N.S.), 179; 30 L. J. (C.P.),

(4) 13 C. B., 836, 844; 22 L. J. (C. P.), 190.

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The remedy of the wife is under the Divorce Act (20 & 21 Vict. c. 85), s. 32, which provides that the court may upon a decree order the husband to secure to the wife such sum of money, &c., as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable.

J. Brown, Q.C. (*Beresford* with him), for the plaintiff: The replication is good. The assault was a legal wrong to the plaintiff which could not be redressed during coverture, because the legal remedy was vested in the defendant and the plaintiff. The dissolution of the marriage has however removed this impediment, and the wife is now entitled to sue, the legal remedy being vested in her alone. It must be conceded that the assault is a wrong, for the right of the wife to obtain articles of the peace is not disputed. But it is said, that it is a wrong without a remedy. But the wife's disability was founded upon nothing but the necessity of joining her husband as plaintiff, a mere difficulty of procedure which no longer exists. Where husband and wife were living apart, and she had a separate maintenance, and he by his violence compelled her to exhibit articles of the peace against him, he was held liable for the expenses as being necessary for her protection: *Turner v. Brookes* (*). 438] And a wife after divorce is entitled for *her sole benefit to such of her property and effects as were not reduced into possession by her husband during coverture: *Wells v. Malbon* (*), *Capel v. Powell* (*), shows that after divorce a man is not liable to be sued jointly with his wife, for a tort committed by her during the coverture. The doctrine that husband and wife are, in law, one person: Co. Litt. 3 a, Story's Equity Jurisprudence, § 1367, is superseded by the statutory divorce, under which the procedure is equitable. With regard to the argument founded on s. 32 of the Divorce Act, the court, if the husband by beating his wife, had disabled her, might perhaps take it into account in awarding alimony; but alimony is not varied by the extent of the husband's delinquency, or with the object of mulcting him as the guilty party: *Hooper v. Hooper* (*).

BLACKBURN, J.: I think that this action cannot be maintained. There can be no doubt that if a wife receives bodily injury from the hands of her husband he is liable to criminal proceedings for a felony or a misdemeanor, as the case may be; and in the case of an ordinary assault it is

(*) 10 A. & E., 47.

(*) 17 C. B. (N.S.), 743; 34 L.J. (C.P.),

(*) 31 Beav., 48; 31 L.J. (Ch.), 344. 168.

(*) 30 L.J. (P. M. & A.), 49.

quite clear that the wife has a right for her protection to obtain articles of the peace against her husband, and upon this and upon other occasions she is in law a separate person. But the question, whether after a divorce a husband can sue his wife, or a wife her husband, for anything which has happened during coverture, depends upon very different considerations. I was at first inclined to think, having regard to the old procedure and the form of pleas in abatement, that the reason why a wife could not sue her husband was a difficulty as to parties; but I think that when one looks at the matter more closely, the objection to the action is not merely with regard to the parties, but a requirement of the law founded upon the principle that husband and wife are one person. It is laid down in Co. Litt. 3 a: "A femme covert cannot take anything of the gift of her husband." And in the note to this passage it is said: "Adjudged acc. in Chancery, 2 Vern. 385, and 3 Atk. 72. But the doctrine must be understood with various limitations. 1. Though the husband cannot convey to the wife immediately, yet he may *give to a trustee for her [439 benefit, and the gift will be good. Therefore he may convey land to her by way of use, as by enfeoffing or covenanting with another to stand seised, or surrendering a copyhold estate to her use." The note then refers to page 112 a, s. 168: "Though a man may not grant nor give his tenements to his wife during the coverture, for that his wife and he be but one person in the law, yet by such custom he may devise by his testament his tenements to his wife;" and in Coke's comment it is said, "This opinion is clear, for by no conveyance at the common law a man could, during the coverture, either in possession, reversion, or remainder, limit an estate to his wife. But a man may by his deed covenant with others to stand seised to the use of his wife, or make a feoffment or other conveyance to the use of his wife. . . . But a man cannot covenant with his wife to stand seised to her use, because he cannot covenant with her, for the reason that Littleton here yieldeth." Com. Dig., Baron and Feme (D. 1), is to the same effect, and an instance is given, that if a man make a bond or contract to a woman, and they afterwards intermarry, the bond or contract is discharged.

These authorities show that the objection to the action is, not because it is one in which husband and wife ought to be joined, but because husband and wife cannot contract with or convey to each other. If the technical objec-

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tion on the score of parties were the only one, either husband or wife, after the death of the other, might sue the executors for acts done during coverture, and this I imagine has never been done. The reason, therefore, why the wife cannot sue the husband for beating her must be because they are one and the same person, and the same reason exists in criminal law, where a woman cannot be convicted of larceny though she has in fact carried away her husband's goods. Other instances might easily be given, all showing that the reason is not the technical one of parties, but because, being one person, one cannot sue the other.

Then, does the dissolution of the marriage by divorce make that a cause of action which was not so before? I do not see why it should. It is not difficult to see why such an action has not been brought before. There could be 440] no question of bringing it *except where the marriage was dissolved by a divorce, for if husband or wife died any action would be defeated by the rule *actio personalis moritur cum persona*. Before the dissolution of the marriage the objection on account of parties would of itself prevent the action.

The 32d section of the Divorce Act (20 & 21 Vict. c. 85) which enables the court in decreeing alimony to take into account the conduct of the parties, in some degree mitigates any hardship in the law, but my decision is without reference to that section, on the ground that there was no cause of action during coverture, and that the dissolution of the marriage does not give one.

LUSH, J.: I am of the same opinion, and I agree with Mr. Brown that this is a point of considerable importance, especially since the passing of the Divorce Act. A wife may now obtain a divorce upon proof of adultery and cruelty by the husband. If therefore we decide in favor of the plaintiff, the effect of our decision would be, that every wife who obtained a divorce on the ground of adultery coupled with cruelty could bring an action similar to this. It is agreed on both sides that this is a case of the first impression, and it must therefore be decided on principle, and with reference to the well-known maxims of the law.

Now it is a well-established maxim of the law that husband and wife are one person. For many purposes, no doubt, this is a mere figure of speech, but for other purposes it must be understood in its literal sense. For example, the husband cannot covenant with or make a grant to his wife, and she cannot in law be convicted of stealing his property. And it is laid down that if a husband is together with others

charged with a crime, the wife cannot give evidence even against the others. It may be safely laid down, I think, that neither can acquire any civil rights against the other, or apply to any civil court to enforce them. For her personal protection the wife may exhibit articles of the peace against the husband, but, in my opinion, her remedy does not extend to the bringing an action against her husband. It remains to consider what is the effect of a divorce on this disability. Now I cannot *for a moment think that [441 a divorce makes the marriage void *ab initio*; it merely terminates the relation of husband and wife from the time of the divorce, and their future rights with regard to property are adjusted according to the decision of the court in each case.

FIELD, J.: I am of the same opinion, though I was not without doubt during the argument; but I now think it clear that the real substantial ground why the wife cannot sue her husband is, not merely a difficulty in the procedure, but the general principle of the common law that husband and wife are one person. In *Firebrass v. Pennant* (') the court says: "As this was a provision by a husband for his wife, we should be glad, if possible, to get over the maxim in law, that a husband and wife are one person. . . . We are dealing with a fundamental maxim of the common law, and might as well repeal the first section of Littleton as determine this grant from the husband immediately to the wife to be good, and where there is not so much as the shadow of a person intervening." Judgment was given in that case for the defendant *reluctante tota curia*. I agree in that decision, but in this case I give my decision without any reluctance, for I think that we should be establishing a dangerous precedent if we held that this action would lie.

Judgment for the defendant.

Solicitors for plaintiff: *Lewis & Lewis*.

Solicitors for defendant: *Tanqueray-Willlaume & Co.*

(') 2 Wils., at p. 255.

Unless a married woman has a legal title to real estate she cannot be properly joined with her husband as a defendant: *Rose v. Bell*, 38 Barb., 25. Though when both husband and wife live on premises which have been conveyed to the wife, who paid the consideration out of her own money, and which had also been leased to her for a term of years, the wife, since the act of 1849, is the actual occupant and the

proper party defendant, unless she has made the husband her tenant, or has put him in actual, or exclusive possession, or has created a joint occupancy in him and herself. The bare fact of their residing together in the dwelling does not make him either sole or joint occupant: *Porter v. McGrath*, 41 N. Y. Superior Court Rep., 85, 102-4.

Section 118 of the old Code of Procedure of New York, which is unre-

pealed by the new Code, would allow her, as owner, to be made a party defendant, in such case, in ejectment against her husband.

The fact that the wife of A. owns the fee of the land on which stands the house in which he lives with his family, is not necessarily inconsistent with his having such a possession of the house as will entitle him to maintain an action against a trespasser for forcibly entering it: *Alexander v. Hard*, 64 N. Y., 228.

See also *Allen v. Cowan*, 23 N. Y., 502; *Rowe v. Smith*, 45 N. Y., 230; *Fisher v. Bailey*, 51 N. Y., 150; *Snyder v. People*, 26 Mich., 106, 12 Am. Rep., 302; *Porter v. McGrath*, 41 N. Y. Superior Court Rep., 102.

A married woman cannot maintain an action against her husband for an assault and battery: *Longendyke v. Longendyke*, 44 Barb., 306.

A married woman cannot maintain an action against her husband to recover damages for slander: *Freethy v. Freethy*, 42 Barb., 641.

The statutes of Iowa do not permit either husband or wife to maintain an action against the other for a tort committed during coverture: *Peters v. Peters*, 43 Iowa, 182.

A married woman may maintain an action against her husband to recover possession of her real estate from which she is excluded by him: *Minier v. Minier*, 4 Lansing, 421.

See, however, *Gould v. Gould*, 29 How. Pr., 441.

A married woman may maintain an action, in equity, against her husband to recover money, the separate property of the wife, which he had wrongfully taken and converted: *Whitney v. Whitney*, 49 Barb., 819, 3 Abb., N.S., 350.

Where a husband, on separation from his wife, executed to her his promissory notes, with personal security for her support and that of his daughter, which, with an agreement relating to the separation, were placed in the hands of a trustee for collection, and afterwards, on the fraudulent pretence that he would live with his wife the husband obtained possession of the same, and then refused to live with her, it was held that owing to the trust, as well as to the fraud practised to obtain possession of the notes, that a court of equity would take jurisdiction of a suit to compel the payment of the same: *Marlow v. Marlow*, 77 Ills., 633.

So a husband will be restrained by injunction from occupying a house, which is the separate property of the wife, even though she reside therein, and the injunction operate as a divorce *a mensa et thoro*: *Green v. Green*, 5 Hare, 400 note; *Kerr on Inj.* (1st Am. ed.), 331.

[1 Queen's Bench Division, 446.]

Jan. 29, 1876.

[CROWN CASE RESERVED.]

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*THE QUEEN V. CRESSWELL.

Bigamy—First Marriage celebrated elsewhere than in a Church—Presumption that Building was duly licensed.

Upon an indictment for bigamy it was proved that the first marriage was solemnized, not in the parish church of the parish, but in a chamber in a building a few yards from the church, while the church was under repair. It was further proved that divine service had several times been performed in the building in question:

Held, that the building must be presumed to have been licensed, and therefore the first marriage was valid, and the prisoner was properly convicted of bigamy.

CASE stated by Kelly, C.B.

The prisoner was tried at the last Summer Assizes at Chelmsford for bigamy and convicted. It was proved that

he married one Sarah Hill in 1868, and that she was still alive; and that he married his present wife, the prosecutrix, in October, 1874, at St. Mary, Islington. It was, however, objected for the prisoner that the first marriage was void on the ground that it was solemnized not in a church, but in a chamber at South Weald Hall, in Essex, which was situate some yards from the parish church, and that the marriage took place while the church was under repair. Divine service had been several times performed in the building in question, from which it was for the court to consider whether the presumption might be raised which would give validity to the marriage. The statutes 4 Geo. 4, c. 76, ss. 21, 22, and 6 Wm. 4, *c. 85, were quoted. The learned [447 judge reserved the point; and the question for the opinion of the court was, whether upon the above facts this was a valid marriage. If not, the conviction was to be set aside; otherwise affirmed.

No counsel appeared for the prisoner.

C. E. Jones, for the prosecution, was not called upon.

LORD COLERIDGE, C.J.: This conviction must be affirmed. The case states that divine service had been several times celebrated in the place where the marriage in question was solemnized. This is sufficient, in accordance with the maxim *omnia presumuntur rite esse acta*, to give rise to the presumption that the building was licensed. The presumption is the stronger because the clergyman who celebrated the marriage might, by 6 & 7 Wm. 4, c. 85, s. 3, have been indicted for felony if he knowingly did so in an unlicensed place.

MELLOR, LUSH and GROVE, JJ., and AMPHLETT, B., concurred.

Conviction affirmed.

Solicitor for prosecution: *E. Doyle*, for *Henry Jones*, Colchester.

[1 Queen's Bench Division, 447.]

May 20, 1876.

[CROWN CASE RESERVED.]

THE QUEEN v. BERRY.

Deaf Mute—Incapacity to understand Proceedings at Trial for Felony.

A deaf mute being tried for felony, was found guilty, but the jury found also that he was incapable of understanding, and did not understand, the proceedings at the trial:

Held, that he could not be convicted, but must be detained as a non-sane person during the Queen's pleasure.

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The Queen v. Berry.

CASE stated by the chairman of the Worcestershire quarter sessions.

At the Worcestershire adjourned quarter sessions, held on the 23d of February, 1876, the prisoner, James Berry, was arraigned for stealing a watch and certain other articles from the person of one Benjamin Smith.

448] *On being called upon to plead to the indictment in the usual manner the prisoner made no reply, and gave no sign of consciousness that he heard or understood the question put to him.

The counsel for the prosecution asked that the chairman should order a plea of not guilty to be entered, and should proceed to try the prisoner. The chairman did not consider that he had any power to adopt this course, and ordered, on the authority of *Rex v. Thomas Jones* (¹) and *Rex v. Elizabeth Steel* (²), that the jury who had been empanelled to try the case should be sworn to try whether the prisoner stood mute of malice or by the visitation of God.

After hearing the evidence of one Robert Knight, who is the brother-in-law of the prisoner, and had known him well from infancy, and who deposed that the prisoner had been deaf and dumb since the age of four years, the jury returned a verdict, "Mute by the visitation of God."

The chairman then ordered that the plea of not guilty should be entered, and that the trial should proceed.

As the said Robert Knight had deposed that he could in some degree communicate with the prisoner by means of signs, the chairman ordered that Robert Knight should be sworn as interpreter in order to convey to the prisoner as far as possible the nature of the proceedings and the evidence against him.

Observing the opinion expressed by Mr. Justice Gould in *Rex v. Elizabeth Steel* (²), "that great diligence and circumspection ought to be exercised in so critical a case," and that "it becomes the duty of the court to inquire touching all these points of which the prisoner might take advantage hereby, to examine all the proceedings against her with a critical eye, and to render her every possible service consistent with the rules of law," and conceiving that his duty in this respect would be best performed by giving the prisoner the assistance of counsel, the chairman accordingly assigned him counsel at the expense of the court.

After summing up the evidence for the prosecution, which was very clear, the chairman put two questions to the jury: first, whether they found the prisoner guilty or not guilty

(¹) 1 Lea. C. C., 452 (n).

(²) 1 Lea. C. C., 451.

on the indictment; secondly, whether, in their opinion, the prisoner was capable of understanding and had understood the nature of the proceedings.

*The verdict of the jury was: "We find the prisoner guilty on the evidence; and we also find that he is not capable of understanding, and, as a fact, has not understood the nature of the proceedings." [449]

On this verdict, looking to the language used by the judges, as reported in *Steel's Case* (1), and the doubt expressed by Lord Hale, the chairman thought it right to postpone judgment till a case had been submitted to this court.

The questions for the opinion of the court were, first, whether, under the circumstances stated above, the prisoner was properly convicted of felony; secondly, if so, whether the court of quarter sessions ought to have passed sentence on the prisoner, or whether it should have ordered him to be detained during Her Majesty's pleasure, or what other, if any, course it ought to have followed.

F. T. Streeten, for the prisoner, was stopped by the court, who called on

Jelf, for the prosecution: The case is governed by *Steel's Case* (1), in which the judges assembled at Sergeant's Inn held that a prisoner, found by the jury to be mute by the visitation of God, might be arraigned and tried for felony, and, on being found guilty, convicted.

[*KELLY*, C.B.: But here the jury have found also that the prisoner was incapable of understanding what passed at the trial, and can it be contended that he might, under such circumstances, be convicted? The question which ought to have been put to the jury in *Steel's Case* (1) was properly put in the present one.

LUSH, J.: Lord Hale says that even if a prisoner, after arraignment and plea, "and before his trial, become of non-sane memory he shall not be tried; or if after his trial he become of non-sane memory he shall not receive judgment; or if after judgment he become of non-sane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution: Co. P. C. 4. But because there may be great fraud in this matter, yet, if the crime be notorious, as treason or murder, the judge, before such respite of trial or judgment, may do well to impanel a jury to inquire, *ex officio*, touching such insanity, and whether it be real or counterfeit": 1 Hale's P. C., p. 35.]

(1) 1 Lea. C. C., 451.

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[450 *Ought a man who, although capable of distinguishing right from wrong, is too stupid to comprehend legal proceedings, to escape from punishment, or perhaps suffer unduly by being detained, at great cost to the country, for a long time during Her Majesty's pleasure?

KELLY, C.B.: This case may be determined both on authority and principle. An authority which has never been overruled or doubted is to be found in *Reg. v. Pritchard* (*), where a person, deaf and dumb, was to be tried for a capital felony before Alderson, B., who ordered a jury to be impanelled to try whether he was mute by the visitation of God; the jury found that he was so. The jury were then sworn to try whether he was able to plead, which they found in the affirmative, and the prisoner by a sign pleaded not guilty. The judge then ordered the jury to be sworn to try whether the prisoner was "now sane or not," and on this question directed them to consider whether the prisoner had sufficient intellect to comprehend the course of the proceedings, so as to make a proper defence, to challenge any question he might wish to object to, and to comprehend the details of the evidence; and that if they thought he had not, they should find him not of sane mind. The jury did so, and the judge ordered the prisoner to be detained under 39 & 40 Geo. 3, c. 94, s. 2. That case is directly in point. But there is also another referred to by Alderson, B., in his summing up. It is *Rex v. Dyson* (*), where a prisoner indicted for murder stood mute. The jury found her mute by the visitation of God. Parke, B., directed a plea of not guilty to be recorded for her, and the jury to be sworn to try whether she was sane or not. Witnesses were sworn and examined, who proved her incapacity, at that time, to understand the mode of trial, or to conduct her defence. And the learned judge, in charging the jury, and after having read to them the passage from Hale's Pleas of the Crown, referred to by my Brother Lush to-day, told them that, if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane. They did so; and his Lordship ordered her to be kept in strict custody under 39 & 40 Geo. 3, c. 94, s. 2, till His Majesty's pleasure should be known.

451] *Further, I believe it to have been the law from the earliest times, that if it is found at the trial of a prisoner that he cannot understand the proceedings, the judge

(*) 7 C. & P., 303.

(*) 7 C. & P., 305 (n).

ought to discharge the jury and put an end to the trial, or order a verdict of not guilty. The jury here have expressly found the prisoner incapable of understanding, and it needs no argument to show that, under such circumstances, he ought not to be convicted. I remember once trying a foreigner, who knew no word of English, and, there being a doubt as to the efficiency of the interpreter, and whether the prisoner could understand every word of the proceedings, I ordered the jury to be discharged. It would be an outrage to the understanding of a man of common sense, to say that in such a case as the present the prisoner should be convicted. He must be detained during Her Majesty's pleasure.

LUSH, J.: I am of the same opinion. If it appears at any time during the trial that the prisoner is of non-sane mind, the proper course is to stop the trial and direct him to be detained during the Queen's pleasure. On that I base my judgment. Such course was adopted in the present case. I understand the finding of the jury, that the prisoner was not capable of understanding, and, as a fact, had not understood, the nature of the proceedings, to mean that the prisoner has not sufficient intellect to understand the nature of the proceedings.

POLLOCK, B., and FIELD and LINDLEY, JJ., concurred.

Steeles suggested that there was no finding of the jury on which the prisoner could be remitted to goal under the statute.

KELLY, C.B.: Yes; for they have actually found that he is not capable of understanding, and has not understood, the nature of the proceedings; which, in point of law, amounts to a finding of insanity.

Conviction quashed, and prisoner order to be detained during Her Majesty's pleasure.

Solicitors for prosecution: *White & Sons*, for M. Curtler, Worcester.

Solicitor for prisoner: *W. N. Marcey*, Worcester.

As to method of arraigning a deaf and dumb person, see 1 Whart. Cr. Law (7th ed.), § 532; 1 Arch. Cr. Pr. and Pl. (8th Am. ed.), p. 17, Pomeroy's Notes. See an elaborate account of the trial of a deaf and dumb person at Berlin in 1828, 8 American Jurist, 158; Arch. Crim. Pl. and Ev. (17th Eng. ed.), 141; Arch. Crim. Pl. and Ev. (17th Eng. ed.), 17; 1 Russ. on Crimes (5th Eng. ed.), 113 and note.

As to method of examining such a person as a witness, see 1 Whart. Crim. Law (7th ed.), § 754; Arch. Cr. Pr. and Pl. (17th Eng. ed.), 270; 1 Russ. on Crimes (9th Am. ed.), 11 and note; 1 Greenl. Ev. (13th ed.), § 866; State v. De Wolf, 8 Conn., 93; Com. v. Hill, 14 Mass., 207; Snyder v. Nations, 4 Blackford (Ind.), 295; 1 Whart. on Evidence, §§ 406-7; 2 Taylor on Ev. (6th Eng. ed.), p. 1194, § 1241.

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Though the presumption is that a person deaf and dumb from birth is an idiot it may be shown that he has the use of understanding, in which case he is capable of committing crime for which he may be punished: *Freeman v. People*, 4 Den., 9; 1 Arch. Cr. Pr. and Pl. (8th Am. ed.), 17, *Pomeroy's Notes*; *The King v. Jones*, 1 Leach (4th ed.), 102; *The King v. Steel*, 1 Leach (4th ed.), 451; *Regina v. Whitfield*, 3 Car. & Kirw., 121; *Reg. v. Dyson*, 7 C. & P., 305 note; 1 *Russell on Crimes* (5th Eng. ed.), 118 and note.

In *Thompson's case* (2 *Lewin*, 137) the prisoner, on arraignment, stood mute. A jury was sworn to try whether he stood mute of malice or by the visitation of God.

The jailor testified that during his confinement of several months he had never heard him speak, that he believed he could neither hear nor speak, and that he was mute by the visitation of God.

The prisoner being able to read, the indictment was handed to him, with the usual questions written upon paper. He was directed to hold up his hand, which he did. He then wrote down his plea of not guilty upon a piece of paper, and in answer to the question, "How will you be tried?" the words, "By God and my country." The names of the jurors were then handed to him with the question, "Whether he objected to any of them?" He wrote for answer, "No." The judge's note of the evidence was handed to him after the examination of each witness; and he was asked in writing if he had any question to put. He was eventually acquitted, and the acquittal handed to him in writing.

The indictment may be properly explained to him by signs, a plea of not guilty entered by order of the court, and the trial proceed: *Com. v. Hill*, 14 *Mass.*, 207; 1 *Arch. Crim. Pr. and Pl.* (8th Am. ed.), 17, *Pomeroy's Notes*.

If a person be found to be mute by the visitation of God, the court should use such means as may be sufficient to enable the prisoner to understand the charge and make his answer, and if this be found impracticable a plea of not guilty should be entered, and the trial proceed: *Arch. Cr. Pr. and Pl.* (17th Eng. ed.), 141.

In *Commonwealth v. Hill* (14 *Mass.*, 207), the prisoner, who was indicted for larceny, was deaf and dumb, but had sufficient capacity to be a proper subject for a criminal prosecution. One Nelson, who was in court, an acquaintance of the prisoner, was sworn to interpret the indictment to him as it should be read by the clerk. The indictment was accordingly read by a sentence at a time, and Nelson, having been sworn, explained its purport to him, making signs with his fingers, &c. "After which the court ordered the trial to proceed as on a plea of not guilty."

In *Regina v. Schleter* (10 *Cox Crim. Cas.*, 409), the prisoner when called upon to plead stood mute. A jury was impanelled and sworn to try whether he was mute of malice or by the visitation of God. A verdict of mute of malice having been rendered, the court ordered a plea of not guilty to be entered on the record, "the trial then proceeded in the usual manner, and the prisoner was found guilty."

In *Regina v. Bernard* (1 *Fost. & Finl.*, 240), the prisoner declined to plead to an indictment charging him with murder, in a plot to assassinate the Emperor of France by means of an infernal machine; the court directed a plea of not guilty to be entered and proceeded with the trial in the usual manner. The same course was taken in the case of the *United States v. Hare*, 2 *Wheeler's Crim. Cases*, 283, 299.

In *Regina v. Whitfield* (3 *Car. & Kirwan*, 121), after the plea of not guilty was entered for a deaf and dumb person found by the jury to be sane, "the trial proceeded in the usual manner, and the evidence was not interpreted to the defendant." In *Kalabergo's case*, cited in a note to the latter case, "the prisoner, who was defended by counsel, had the whole of the evidence interpreted to him, merely because he was an Italian who did not understand the English language."

In *Regina v. McEtyre* (1 *Crawford & Dix's Circuit Cases*, 402), after the jury had found the prisoner mute by the visitation of God, it appearing that he was somewhat deaf and altogether dumb, but could communicate intelligence to others and be communicated with by signs, he was arraigned for

larceny and tried. "The evidence as given was communicated to him by the interpreter." He was convicted and sentenced to five months' imprisonment. The "sentence was also communicated to the prisoner through the interpreter."

When a prisoner, upon being arraigned stands mute, and it is suggested that he is deaf and dumb, a jury should be impanelled to try the fact, and if the finding be in the affirmative, and that he is incapable of understanding the nature and incidents of a trial, the court should order it to be so certified, to the end that provision may be made for his safe keeping, in an asylum for the insane, or otherwise according to law: *State v. Harris*, 8 Jones (N.C.), 136.

Where a prisoner, on being arraigned, stands mute, or it appears questionable whether he be sane or not, the proper course is to swear a jury to try the question, as it is for them and not for the court to decide whether the prisoner stands mute of malice or is insane: *Reg. v. Israel*, 2 Cox's Crim. Cases, 268.

The jury are to be sworn on each issue separately: *Rex v. Pritchard*, 7 C. & P., 803, 82 Eng. Com. Law Rep.

The jury are sworn as follows: "You shall well and truly try whether A. B., the prisoner at the bar who stands charged with felony, is mute of malice, or by the visitation of God, and a true verdict give according to the evidence; so help you God": *Arch. Cr. Pr. and Pl.* (17th Eng. ed.), 141; *Reg. v. Israel*, 2 Cox's Cr. Cas., 268.

The form of the oath administered to the interpreter in *Rex v. Dyson*, 7 C. & P., 805 note, was as follows: "You solemnly swear that you will well and truly interpret and make known to the prisoner at the bar, by such signs, ways and methods as shall be best known to you, the indictment and inquisition wherewith she stands charged; and also all such matters and things as the court shall require to be made known to her; and also well and truly interpret to the court the plea of the said prisoner to the said indictment and inquisition respectively, and all answers of the said prisoner to the said matters and things so required to be made known to her, according to the best of your skill and understanding—so help you God."

In *Reg. v. Whitehead* (10 Cox's Cr. Cas., 234, L. R., 1 C. C. Res., 39), on a prosecution for rape, it appeared that the prosecutrix was deaf and dumb; and her father, who was sworn to interpret her evidence, said that he believed her to be ignorant of the nature of an oath. An expert, however, came, and from his report to the court the prosecutrix was sworn, and her evidence taken down as interpreted by the expert. In the course of her examination it became apparent that she did not understand the questions, and that her answers could not be relied upon. The judge directed her to stand down, and struck out her evidence from the case: Held, that although the prosecutrix had been sworn, the judge acted rightly in striking out and withdrawing her evidence from the jury.

[Queen's Bench Division, 452.]

May 20, 1876.

[CROWN CASE RESERVED.]

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Ballot Act, 1872 (35 & 36 Vict. c. 33)—*Prosecution for Offences under—Order for Production of Voting Papers—Conditions for Secrecy—Inspection of Papers at Trial—Rules 40, 41, 64.*

A prosecution having been instituted against a deputy-returning officer, who had presided at a booth during a municipal election, for offences under the *Ballot Act*, 1872 (35 & 36 Vict. c. 33), a county court judge, in the exercise of jurisdiction given by sched. 1, part II, rule 64 of the act, made an order directing the town clerk of the borough to produce and show, for the purpose of the prosecution, certain rejected ballot papers, counterfoils, counted ballot papers, and spoilt ballot papers

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relating to the same polling station, and to open the sealed packets containing those documents, and the marked copy of the register, and to take all such proper means as he should deem necessary in order that the mode in which any particular elector had voted should not be discovered; and further ordered that no person should be allowed to see the face of the counted ballot papers. At the trial of the indictment against the prisoner, charging him with having fraudulently placed papers purporting to be, but to his knowledge not being, ballot papers in the ballot box, Blackburn, J., allowed the counterfoils and marked register produced under the aforesaid order to be given in evidence, and the face of the voting papers to be inspected so as to show how the votes appeared to have been given:

Held, that this was rightly done.

CASE stated by Blackburn, J.

The prisoner was tried at Manchester on an indictment charging him in thirty-seven different counts with having at a municipal election fraudulently placed seventeen different papers, purporting to be, but to his knowledge not being, ballot papers in the ballot box.

Evidence was given that on the 1st of November, 1875, there was an election for three councillors for the ward of Heaton Norris, in the borough of Stockport, and that there were six candidates, three of the blue party and three of the red party.

The prisoner was appointed presiding officer at one of the booths, and acted as such, and had the custody of the ballot papers and box. A return from him showing that he had used 402 ballot papers was proved. At the close of the day he delivered over the ballot box, and a sealed packet containing the marked copy of the register of voters, and the 453] counterfoils of the *ballot papers. After the voters were counted the ballot papers were put in a packet and sealed up. An order of the County Court of Cheshire, holden at Stockport, was then proved. [A copy accompanied and formed part of the case (').] A sealed packet

(1) The order of the County Court judge was as follows:

"The Ballot Act, 1873.

"The Corrupt Practices (Municipal Elections) Act, 1872. In the County Court of Cheshire, holden at Stockport, the 25th day of February, 1876.

"In the matter of prosecutions against Joseph Beardsall, for personation and other offences against the Ballot Act, alleged to have been committed by him as presiding officer at the election of town councillors for Heaton Norris Ward, in the borough of Stockport, held on the 1st day of November, 1875.

"Upon hearing Mr. Francis Newton, solicitor on behalf of George Massey, the prosecutor, and the said Joseph

Beardsall, and being satisfied by evidence on oath that the inspection and production of the under-mentioned election documents are required for the purpose of instituting or maintaining a prosecution against the said Joseph Beardsall for an offence or offences in relation to ballot papers—it is ordered that Mr. Walter Hyde, the town clerk for the said borough of Stockport do produce and show for inspection to the said George Massey and his solicitor or agent, on Thursday, the 2d day of March, 1876, at such hour as the said town clerk shall appoint, and such other days and hours as may be convenient to the said town clerk, at the Court House, in Vernon Street, in the said borough, the under mentioned

*was produced, and evidence was given, that in obedience to that order the original seals had been broken, and the counterfoils and marked register and the back of the ballot papers had been inspected, and had been again inspected by the magistrate before whom the charge was investigated, and before the grand jury. On each occasion the packets were again sealed up. It was then proposed to open the packet for the purpose of giving the contents in evidence. The counsel for the prisoner objected to this, relying on rules 40, 41 and 64 in the 1st schedule to 35 & 36 Vict. c. 36, as enacting that these documents should not be examined, except in a contested election, and by order of an election tribunal, and that the county court was not acting as an election tribunal when making this order. The learned judge doubted whether this objection was not well founded, but the mischief, if any, having been already done,

documents and papers, and also, after being served with a summons or subpoena for that purpose, to produce and show the same for inspection at any time or times as may be required under summons or subpoena in any court as evidence for the purpose of maintaining the said prosecutions against the said Joseph Beardsall for the offences aforesaid.

"1. The rejected ballot papers relating to the said election for Heaton Norris Ward.

"2. The counterfoils of the ballot papers marked by the presiding officer in Booth A to B., relating to the said election.

"3. The counted ballot papers relating to the said election, particularly the ballot papers corresponding to the following numbers written on the said counterfoils [stating certain numbers.]

"4. The spoilt ballot papers relating to the same polling station.

"And it is further ordered for the purposes aforesaid, that the said town clerk do cause to be opened the sealed packets containing the said rejected ballot papers, the counterfoils of the ballot papers used at polling station A to B, relating to the said election, the marked copy of the register used in the same polling station, the counted ballot papers, the spoilt ballot papers relating to the same polling station at the said election, and to break any other seal or seals which may be necessary for the purposes aforesaid, and that the said town clerk do by himself or by some

person or persons to be by him appointed for that purpose attend on such production and inspection during the whole time thereof. And further, that the said town clerk and such other persons shall take and use all such proper means and precautions as he shall deem necessary in order that the mode in which any particular elector has voted shall not be discovered; and in order that no person see the face of any counted ballot paper, and in order that the said documents and papers so to be produced and inspected shall be safely kept from loss, damage, or other matter or thing whereby the same, or any of them, shall be injured, prejudiced, or altered in any way.

"It is further ordered that the town clerk shall immediately after each such production and inspection return the said documents to their packets and re-seal the same.

"It is further ordered that the persons entitled to be present at the said inspection are the town clerk and his assistants, the said George Massey and his solicitor or agent, and the said Joseph Beardsall and his solicitor or agent, and the worshipful the mayor of Stockport, or, in his absence, the deputy mayor of Stockport.

"It is lastly ordered that no person shall be allowed to see the face of any counted ballot paper.

"A copy of this order shall be served on the said Joseph Beardsall, or his solicitor, and on the town clerk."

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he resolved to receive the evidence, reserving the point. He requested the counsel for the prosecution to begin with any one case, and the counsel for the defence to raise their objections on it, after which the other cases could be dealt with, subject to the rulings on the first. This was acceded to. The counterfoil numbered 105 was then examined, and appeared on it to have in pencil the number of 116. On reference to the register 116 was found to be the number of James Bancroft, 95 Great Egerton Street, Heaton Norris. It was then proved that James Bancroft died in September, 1875, before this election, and that the deceased was the 455] person on the register. *The voting paper bearing the number 105 printed on it and marked with the official mark on each side was then produced out of the heap. It was folded up, and the counsel for the prosecution requested that it might be opened so as to ascertain for what candidates the votes on this paper were given. To this the counsel for the prisoner objected, relying on the latter part of rule 41. The learned judge thought that, it being proved to his satisfaction that the voter 116 on the register did not vote at all, and that the voting paper was a fabrication, the paper might be opened. It was so, and it proved that the three votes were given for the three blue candidates. The prosecution then, in similar manner, proved that fifteen of the other papers were in respect of counterfoils, on three of which were the number in the registry 334, on two the number 102, and on ten different other numbers.

No one of the twelve persons registered voted at this booth, and the votes purporting to be given on these papers were in each case for the three blue candidates.

The marked register had the names of all these persons scored through, as if each of the voters (or some one believed to be the man) had applied for and obtained the papers.

The prosecution were unable to prove that the person entitled to vote by the 17th paper in the indictment did not do so, so that sixteen cases only were proved.

Evidence was then given by the red personating agent, who produced his copy of the register on which he had marked the names as they were called over.

He had marked in all 382, instead of, as the prisoner's return showed, 402, and no one of the names of the fourteen names of the voters whose numbers were on the seventeen counterfoils was on his list struck through, and no one had in his presence asked in the name of any one of them for a voting paper.

He was absent for a few minutes once or twice, and it

was admitted that the three persons, who in addition to the seventeen made the twenty whose names were marked on the defendants' register and not on his, had in fact voted, but it was very improbable that as many as sixteen votes could have escaped his notice.

The blue personating agent was not called on either side.

*Some evidence was given that the prisoner was a [456 blue.

On this evidence the jury found that the prisoner had guilty knowledge that the papers were not asked for by the voters, and that he fraudulently issued them with the intent that they should be placed in the ballot box as they were.

On this the learned judge entered the verdict of guilty on thirty-two of the thirty-five counts, but respited sentence and admitted the prisoner to bail.

The verdict was in the opinion of the learned judge right on the evidence admitted. But if the counterfoils had not been inspected there would not have been any evidence against the prisoner; and if the ballot papers had not been opened so as to show that all the false votes were on one side the evidence would not have been so strong, and the verdict might have been different.

The questions for the court were—

1. Was it wrong, under the circumstances, to allow the counterfoils and marked register to be given in evidence?

2. Was it wrong, under the circumstances, to allow the face of the voting papers to be inspected so as to show the votes purported to be given?

3. Ought the conviction to be quashed on both or either grounds?

Ambrose, Q.C., for the prisoner: The county court judge had no power to make such an order as he did in this case unless a municipal election were in question.

[*LUSH, J.*: Then the Legislature have made offences punishable under s. 3, and prevented proof of them?]

No, but have preferred secrecy of voting to the prosecution of election misdeeds.

[*KELLY, C.B.*: Why might not my Brother Blackburn open the papers at the trial?]

Because of the express prohibition in rule 41 that no person shall do so except by order of the House of Commons or an election tribunal.

[*KELLY, C.B.*: Could not the House of Commons order it?]

Not for the mere purposes of a prosecution, for the power

457] is only *given to them when dealing with questions of election, as the proviso in rule 41 shows⁽¹⁾.

Where jurisdiction is intended to be given to the criminal or other courts over the papers the act confers it in distinct terms, as in rule 40, which deals with rejected ballot papers. Rule 64 only enables the county court to make an order in respect of ballot papers. The carefully devised provisions for secrecy of voting contained in the act would be useless if, on every prosecution or attempted prosecution, these papers could be looked at. Discovery could always be obtained by the simple expedient of taking proceedings against some supposed offender under the act. The power of the county court judge would appear, from rule 64, to be but ancillary to that of the election tribunal, and he could only make an order for the purposes of such a court. Moreover, even if the order were valid it has been disregarded, for it expressly declared that no person should be allowed to see the face of any counted ballot papers.

[KELLY, C.B.: Can you contend that such prohibition applied to my Brother Blackburn?]

It is absolute enough in terms to do so.

458] *C. Russell, Q.C., and Wright, for the Crown, were not required to argue.

KELLY, C.B.: This case is clear. The Legislature has no doubt provided that secrecy shall be preserved with respect to ballot papers and all documents connected with what is now made a secret mode of election. But this secrecy is subject to a condition essential to the due administration of justice and the prevention of fraud, forgery,

(1) By 35 & 36 Vict. c. 33, sched. 1, rule 37, the returning officer shall seal up in separate papers the counted and rejected ballot papers; and by s. 38 shall forward them to the Clerk of the Crown in Chancery, who, by s. 39, shall retain them for a year.

And rule 40 enacts that "No person shall be allowed to inspect any rejected ballot papers in the custody of the Clerk of the Crown in Chancery, except under the order of the House of Commons or under the order of one of Her Majesty's superior courts, to be granted by such court on being satisfied by evidence on oath that the inspection or production of such ballot papers is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers, or for the purpose of a petition questioning an election or return . . ."

Rule 41: "No person shall, except by order of the House of Commons, or any tribunal having cognizance of petitions complaining of undue returns or undue elections, open the sealed packet of counterfoils after the same has once been sealed up, or be allowed to inspect any counted ballot papers in the custody of the Clerk of the Crown in Chancery, such order may be made subject to such conditions as to persons, time, place, and mode of opening or inspection as the House or tribunal making the order may think expedient; provided that on making or carrying into effect any such order, care shall be taken that the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted, and his vote has been declared by a competent court to be invalid."

and other illegal acts affecting the purity and legality of elections. Rule 41 (') of the act is certainly expressed in absolute terms which will doubtless be observed by any competent authority to whom an order made under them may be directed. It provides that the papers shall be kept secret, that is, so far as may be possible consistently with the object of the order. By Rule 64 (b) of Part II ('), containing rules for municipal elections, an order of the county court having jurisdiction in the borough . . . shall be substituted for an order of the House of Commons or of a superior court. And the county court judge here made an order in strict pursuance of the terms of the rule and for the purposes of justice, in order to cause a prosecution to be instituted and carried on under this very Ballot Act. I therefore fail to see why the order is not legal. Of course, when the documents were opened every care would be taken to keep the information therein contained as to the voting secret. We are not called upon to determine whether, if no order had been made, and by accident these documents had been in court, it would not have been *compe- [459 tent to the learned judge to look at them, nor do we decide that point, as it is unnecessary to do so. But we think that the order of the county court, being perfectly within the terms of the act, was valid, and that the documents taken out of the packets and produced under it during the trial of an indictment against the prisoner for an offence against the Ballot Act, were properly admissible in evidence.

LUSH, J.: I am of the same opinion. It was argued that secrecy was the only object of the Ballot Act; but I do not agree to the proposition. Secrecy was one object, the other was to secure purity of election; and it is difficult to say which is most important. Therefore we find, as might be expected, certain fraudulent acts defined by s. 3, and punishable as misdemeanors, which would seriously inter-

(1) *Ante*, p. 457, n.

(2) Part II. Rules for Municipal Elections, rule 64:

(b.) All ballot papers and other documents which, in the case of a parliamentary election, are forwarded to the Clerk of the Crown in Chancery, shall be delivered to the town clerk of the municipal borough in which the election is held, and shall be kept by him among the records of the borough; and the provisions of Part I of this schedule, with respect to the inspection, production, and destruction of such ballot papers

and documents, and to the copies of such documents, shall apply respectively to the ballot papers and documents so in the custody of the town clerk, with these modifications, namely:

(a.) An order of the county court having jurisdiction in the borough or any part thereof, or of any tribunal in which a municipal election is questioned, shall be substituted for an order of the House of Commons, or of one of Her Majesty's superior courts; but an appeal from such county court may be had in like manner as in other cases in such county court.

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fere with either, viz., forging or fraudulently defacing or destroying nomination or ballot papers, supplying, or putting into the ballot box any ballot papers, &c. Now one would expect to find some security provided against the disclosure of the papers, but, on the other hand, some means by which the crimes enumerated should be proved, and some of those crimes it would be impossible to prove without opening the papers. Such was the case here. Both objects seem to be secured by rules 40 and 41, in both of which the power of the House of Commons is without restriction. Rule 40 enacts that no person shall be allowed to inspect any rejected ballot papers without an order of the House or of one of the superior courts, to be granted by such court on being satisfied that the inspection is required for a prosecution, &c., the rule differing from rule 41 in this respect, viz., that by the first power is given to any superior court, but only for a limited purpose, viz., that of a prosecution for an offence in relation to ballot papers, while no such restriction is placed on the House of Commons. Then in rule 41 there is a proviso placing both the House and the tribunals under restrictions.

With respect to municipal elections the county court judge is put into the place of the House of Commons, and must exercise his discretion, and he has done so here. It seems to me to have been quite within the contemplation of the act that this order should be made under the circumstances which existed here. The county court judge must 460] have been satisfied of the necessity for it, and *thé event proved him to have been right. Then having been once made by the county court judge, I should say the necessary implication, from the fact of the statute having created certain offences and provided for the making of an order in aid of the prosecution, would be that the papers might be opened, but under certain safeguards, which the county court judge has in the proper exercise of his discretion placed around the inspection.

POLLOCK, B.: I am of the same opinion.

FIELD, J.: I, too, concur. The danger of a county court judge acting improperly is counteracted by an appeal to the superior court.

LINDLEY, J.: I agree. If we were to construe the order of the county court judge as Mr. Ambrose suggested, it would defeat the purposes for which the order was made, viz., that the offences might be proved. The order further says that the papers shall not be shown, but the rational construction is that the documents must be produced at the

trial, but, except for the purposes of the trial, must not be disclosed.

Conviction affirmed.

Solicitors for prosecution: *Hopwood & Sons.*

Solicitors for prisoner: *Le Riche & Son*, for Cobbett & Co., Manchester.

[1 Queen's Bench Division, 480.]

Jan. 19; May 1, 2, 1876.

[IN THE COURT OF APPEAL.]

RAWLEY V. RAWLEY.

Infant—Ratification of Contract after full Age—9 Geo. 4, c. 14, s. 5—Set-off—2 Geo. 2, c. 22, s. 13.

Upon the true construction of 2 Geo. 2, c. 22, s. 13, and 9 Geo. 4, c. 14, s. 5, a set-off cannot be maintained of a debt, contracted by the plaintiff during infancy and not ratified by him in writing after full age.

DECLARATION for money lent by plaintiff to defendant.

Plea, *inter alia*, set-off on a promissory note of the plaintiff, and for money lent, &c., by defendant to plaintiff.

Replication, that the plaintiff was an infant at the time of making the note and contracting the alleged debt.

*Rejoinder, that plaintiff, after he became of full [461] age, and before action, ratified the promise and contract. Issue joined.

At the trial before Field, J., at the Middlesex sittings, 1875, the plaintiff proved his debt, and the defendant proved a set-off on a promissory note of the plaintiff, for money lent to him by defendant, to a larger amount, but it was admitted that the plaintiff was an infant at the time he contracted the debt and made the note, and only a verbal ratification after he came of age was proved.

The learned judge directed judgment to be entered for the defendant, with leave to move to enter a verdict for the plaintiff for £44 17s. 3d., the amount of his debt.

Notice of motion was given accordingly, on the ground that the ratification of the plaintiff, not being in writing and signed by him, was ineffectual and void at law; and no legal ratification was proved.

Jan. 19. *F. Turner*, for the defendant: Lord Tenterden's Act (9 Geo. 4, c. 14, s. 5) ('), which enacts that no action shall be maintained upon a ratification not in writ-

(1) 9 Geo. 4, c. 14, s. 5: "No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."

ing of a contract made during infancy, does not extend to set-off.

[FIELD, J.: *Leroux v. Brown* (¹), upon the words of the 4th section of the Statute of Frauds (29 Car. 2, c. 3), "no action shall be brought," makes in the defendant's favor, but that case has not been altogether approved.]

Similar words in the Attorneys and Solicitors Act (6 & 7 Vict. c. 73), s. 37, "No attorney or solicitor shall commence or maintain an action or suit" for his fees until one month after the delivery of a signed bill, have been held not to extend beyond an action and suit: *Harrison v. Turner* (²), *Brown v. Tibbits* (³), the latter of which cases expressly 462] decides that such fees may be set-off *notwithstanding the want of a signed bill. The words of the Statute of Limitations (21 Jac. 1, c. 16), s. 3, "All actions" of certain classes "shall be commenced" within certain specified times, have been similarly construed in the latest case upon the subject: *Gee v. Liddell* (⁴). [He also referred to *Townshend v. Stangroom* (⁵).]

R. T. Reid (Sim with him), for the plaintiff: There would be inequality between a plaintiff and a defendant if a debt not actionable could be set-off; and the Statutes of Set-off (2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 5) mean, by "debts," actionable debts. That is laid down, as already decided, in *Francis v. Dodsworth* (⁶), and is established by that case and *Remington v. Stevens* (⁷), *Chapple v. Durston* (⁸), *Walker v. Clements* (⁹). The law is laid down to the same effect in Buller's N. P. 180. The case of *Gee v. Liddell* (⁴) did not turn upon the Statute of Limitations as supposed in the argument of the other side, nor upon the Statutes of Set-off. When a statute says "No action shall be brought," any proceeding by which a debt may be enforced through the courts of law is included: *Banks v. Crossland* (¹⁰). The decisions on the Attorneys and Solicitors Act (6 & 7 Vict. c. 73, s. 37), *Harrison v. Turner* (¹¹), and *Brown v. Tibbits* (¹²), are not in point, the policy of that enactment, as of the earlier enactments referred to in *Lester v. Lazarus* (¹³), being to prevent attorneys from bringing oppressive actions, whilst the policy of

(¹) 12 C. B., 801; 22 L. J. (C.P.), 1.

(²) 10 Q. B., 482; 16 L. J. (Q.B.) 295.

(³) 11 C. B. (N.S.), 855; 31 L. J. (C.P.), 206.

(⁴) 35 Beav., 629.

(⁵) 6 Ves., 328.

(⁶) 4 C. B., at p. 220; 17 L. J. (C.P.), at p. 187.

(⁷) 2 Str., 1271.

(⁸) 1 C. & J., 1.

(⁹) 15 Q. B., 1046.

(¹⁰) Law Rep., 10 Q. B., 97.

(¹¹) 10 Q. B., 482; 16 L. J. (Q.B.), 295.

(¹²) 2 C. M. & R., 665.

the enactment, the effect of which, in connection with set-off, is in question in this case, Lord Tenterden's Act (9 Geo. 4, c. 14, s. 5) is, as shown by the preamble to the act, to require satisfactory evidence. And *Brown v. Tibbits* (*), the only one of those two cases directly raising the question of set-off, was decided in compliance with the settled understanding of the profession rather than with regard to the strict construction of the statutes. *Spears v. Hartly* (**) and other cases holding that the Statutes of Limitations *and similar enactments affect only the remedy for [463 the debt, and not the debt itself, are perfectly consistent with the cases already cited upon set-off.

[FIELD, J., referred to the Infants' Relief Act, 1874, 37 & 38 Vict. c. 62, s. 2 (*).]

Even if the plaintiff could otherwise avail himself of that act, he cannot do so, as it applies only to ratifications after the passing of the act.

COCKBURN, C.J.: I am of opinion that this rule should be made absolute. The question which we have to decide arises upon a plea of set-off, followed by a replication of infancy, and a rejoinder of ratification after full age. The right of set-off depends, I think, upon there being an actionable debt. The statute, no doubt, speaks of "debt," but that, unless a very narrow construction be adopted, means actionable debt. The 9 Geo. 4, c. 14, s. 5, in saying that "no action" shall be maintained upon a ratification without writing of an infant's debt or contract, uses substantially the same language as the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, and others, which say that "all actions" of certain kinds are to be commenced within certain specified times; and it has been held in *Remington v. Stevens* (*), that the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, may be replied to a plea of set-off: there is therefore quite sufficient authority for holding, and for applying to the present case, the view that the statute of set-off in speaking of a "debt" means an actionable debt. No doubt the Attorneys and Solicitors Act (6 & 7 Vict. c. 73, s. 37), in saying that no attorney or solicitor shall "commence or maintain an action or suit" for his fees until one month after the delivery of a signed bill, uses language similar to that of 9 Geo. 4, c. 14, s. 5; and it has been held in *Brown*

(1) 11 C. B., (N.S.) 855: 31 L. J. (C.P.), 206.

(*) 3 Esp., 81.

(2) 37 & 38 Vict. c. 62, s. 2: "No action shall be brought . . . upon any

promise made after full age to pay any debt contracted during infancy whether there shall or shall not be any new consideration for such promise. . . ."

(*) 2 Str., 1271.

v. *Tibbits* (¹), that an attorney or solicitor may set off his fees, notwithstanding the want of a signed bill; but that decision, although it must govern cases upon 6 & 7 Vict. 464] *c. 73, s. 37, unless it should hereafter be overruled by higher authority, ought not, I think, to be treated as governing the present case, upon which we have, as I have said, the closer authority of *Remington v. Stevens* (²), followed in *Francis v. Dodsworth* (³); and it is perhaps to be explained on the ground of the peculiar relation between a solicitor and his client, though I myself doubt whether it was rightly decided. As to *Gee v. Liddell* (⁴), it was not decided upon the Statute of Limitations, or the Statute of Set-off, but upon quite different grounds.

MELLOR, J.: I am not so clearly of opinion that this rule should be made absolute as my Lord and my Brother Field are. The 9 Geo. 4, c. 14, s. 5, says, "no action shall be maintained," and I at first thought that "action" could not be extended to set-off; but Mr. Reid's argument has shaken my view; and, as to *Gee v. Liddell* (⁴), he has pointed out that it did not turn upon the Statute of Limitations on which, in the argument of his opponent, it was supposed to turn, and I therefore do not dissent.

FIELD, J.: I am of opinion that the rule must be made absolute. The action was brought for money lent. The defendant pleaded a set-off of a promissory note. The plaintiff replied infancy at the time of making the note. The defendant rejoined ratification after full age. The question was thereupon raised at the trial whether ratification without writing was sufficient with reference to the plea of set-off; and that is the question which we have to determine. Decisions upon the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, s. 37, have been cited on the part of the defendant, but the policy of Lord Tenterden's Act, 9 Geo. 4, c. 14, with sect. 5 of which we have to deal, was different, its policy being to get rid of disputes as to whether certain acknowledgments, ratifications, and other acts, had really taken place. The preamble of the act, no doubt, refers only to the Statute of Limitations; but section 5, enacting that no action should be brought upon a ratification after full age of an infant's debt or contract, unless the ratifica- 465] tion was in writing, must have had the same *policy. Therefore I think that the word "action" in this section may properly be held to have a larger meaning than the

(¹) 11 C. B. (N.S.), 855; 31 L. J. (C.P.), 206.

(²) 2 Str., 1271.

(³) 4 C. B., 202; 17 L. J. (C.P.), 185.

(⁴) 35 Beav., 629.

everyday legal meaning of the word, and I do not see, on the other hand, any reason for putting a narrower construction upon it. Then is there authority for attaching the larger meaning? The language of the Statute of Set-off, though it says only "debt," has been held by a long series of decisions to mean actionable debt.

Judgment for the plaintiff.

On appeal,

May 1 and 2. *F. Turner*, for defendant, urged the same arguments as in the court below. In addition to the cases there cited, he referred to *Williams v. Moore* (') and *Mad-don v. White* (') as to contracts and ratification by infants; and *Philpott v. St. George's Hospital* ('), that the language of a statute ought to be taken in its plain and ordinary sense, and not interpreted by the supposed policy of the act. He also referred to s. 4 of 9 Geo. 4, c. 14 ('), and argued that the position of the enactment showed that the remainder of the act was not intended to apply to set-off.

Philbrick, Q.C., and *R. T. Reid*, for the plaintiff, were not heard.

JESSEL, M.R.: The question is a simple question of law, whether, when in an action for a debt the defendant pleads a set-off, to which there is a replication that the plaintiff was an infant when he contracted the debt, and a rejoinder of confirmation of the debt by the plaintiff after he came of age, and this confirmation is not in writing, the plaintiff can have the benefit of s. 5 of Lord Tenterden's Act (9 Geo. 4, c. 14).

It is said for the defendant that, though the debt by the force of Lord Tenterden's Act could not have been made the subject of *an action, yet the statute does not [466 apply to the debt when it is the subject-matter of set-off. To this there seem to me to be several distinct answers. First, when we look to the object of the statute, as stated in the title, which is "An act for making a written memorandum necessary to the validity of certain promises and engagements," there is nothing to limit its operation to an action; and when s. 5 says that no action shall be maintained on a debt contracted or promise made during infancy, unless ratified in writing after coming of age, it would be

(') 11 M. & W., 256.

(') 2 T. R., 159.

(') 6 H. L. C., 338.

(') 9 Geo. 4, c. 14, s. 4: "The said recited acts [21 Jac. 1, c. 16, and 10 Car. 1, sess. 2, c. 6, the English and Irish

Statutes of Limitations] and this act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise."

a most singular result if the courts were to hold that this did not apply to set-off, and so in effect were to say, though no action could be maintained upon the promise, yet that the promise was still valid if set up by the same person by way of set-off in an action in which he is defendant. But it is to be observed that set-off is founded on statute, and the only meaning of the act was to prevent cross actions, and it was not intended to give new rights, except to the extent of giving facilities for the enforcing of rights which were already enforceable in an action; and it has always been accordingly held, that a set-off can only be successfully pleaded when an action could have been maintained for the same debt. And if this is so, the position of the defendant, founded on the particular wording of the section, is not maintainable. Secondly, the terms used in s. 5, "no action shall be maintained," are not so different from those of s. 13 of the Statute of Limitations (21 Jac. 1, c. 16), "all actions shall be commenced and sued within the times hereafter expressed," viz., actions of debt on simple contract, &c., within six years after the cause of action; and, though the words are "no action shall be commenced," yet it has been held that the statute could be replied by the plaintiff to a plea of set-off, although no action had been commenced; the courts, in fact, held that a plea of set-off was equivalent to a cross action. To this it may be added that s. 4, which says that this act and the recited acts shall apply to debts alleged by way of set-off, if not conclusive, very much strengthens this construction. Thirdly, a literal construction of an act always follows when such a construction is clearly in accordance with the general intention of the act. Now s. 4 says the recited acts and this act shall apply to set-off. In applying this act, therefore, to set-off, we are 467] literally applying *the words of s. 4 in the general terms in which they are used, that is, interpreting "this act" to mean "the whole of this act."

On these grounds I am of opinion that the judgment must be affirmed.

KELLY, C.B.: It appears to me that the judgment ought to be affirmed on two, at least, of the grounds given by the Master of the Rolls. First, on the words of the act: s. 5 says no action shall be maintained on a promise by an infant, unless ratified in writing after he comes of age; it does not say that such a promise shall have no legal effect whatever, but it certainly amounts to saying that such an unratified promise or debt shall be a debt or promise which cannot be enforced. Now, the words of the Statutes of Set-

off are, that where there are mutual debts between the plaintiff and defendant one may be set-off against the other. But are these mutual debts here, when one of them is a debt for which an action cannot be brought? Clearly, in my opinion, they are not. Secondly, s. 4 of Lord Tenterden's Act (9 Geo. 4, c. 14) says that "the recited acts and this act shall be deemed and taken to apply to any debt on simple contract alleged by way of set-off by the defendant." That *paima facie* means the whole act, and if so, then s. 5 applies to set-off, and this is conclusive in favor of the plaintiff. I should have been inclined to affirm the judgment on this ground alone; but as there are other valid grounds I prefer relying on them also. A case has been cited before the late Master of the Rolls⁽¹⁾; it is scarcely intelligible, and possibly it may have been decided on valid grounds; but, if it is in point, at all events there are stronger authorities the other way. The cases as to attorneys' bills proceed on quite different grounds, the statute has no relation to the debt, but simply to what must be done before there shall be a right of action.

MELLISH, L.J.: I am of the same opinion. The proper construction to be put upon the Statute of Set-off (2 Geo. 2, c. 22, s. 13) is thus noticed in the judgment of Wilde, C.J., in *Francis v. Dodsworth*⁽²⁾: "The judicial construction of this section has been, *that no debts can be used [468 by way of set-off except such as are recoverable by action; and it has accordingly been held that the Statute of Limitations may be replied to a plea of set-off." Consequently, when Lord Tenterden's Act says that no action shall be maintained on a debt or promise made by an infant, unless ratified in writing by him when of full age, it necessarily follows that whenever no action could be maintained for the debt, the debt cannot be set-off. It is said that there are decisions the other way; those most relied upon are confined to the cases as to set-off of attorneys' bills. But the only effect of the statute, which requires a signed bill to have been delivered before an attorney brings an action on the bill, is to postpone the remedy by action; and it leaves untouched the other remedies, which remain as before, such as set-off. But the effect of s. 5 of Lord Tenterden's Act is not to postpone the bringing of an action until the plaintiff has done something, but the plaintiff cannot sue at all unless the infant has chosen to ratify his debt in writing after he came of full age; the consequence is, that a debt ratified verbally is exactly the same as if it had not

⁽¹⁾ *Gee v. Liddell*, 35 Beav., 629. ⁽²⁾ 4 C. B., at p. 220; 17 L. J. (C.P.), at p. 187.

been ratified at all. On the other grounds mentioned by the Master of the Rolls I also agree that the judgment should be affirmed.

DENMAN, J.: I confess that the case of *Brown v. Tibbits* (*) appeared to me at first to throw a difficulty in the way of the construction put by the Queen's Bench Division on Lord Tenterden's Act, but there are grounds on which it may well be distinguished. The words of 6 & 7 Vict. c. 73, s. 37, are extremely like the words of s. 5 of Lord Tenterden's Act; but though they are very like, they are not the same, and they refer to a totally different subject-matter; and it is to be noted that Williams, J., puts the decision very much upon the long-established practice. Now, if long-established practice is to have any weight in the present case, the practice is in favor of the present decision, for as long ago as Strange's Reports the Statute of Limitations was held to apply to set-off. The law is so laid down in Buller's Nisi Prius, p. 180; and the recent case of *Francis* 469] v. *Dodsworth* (*) affirms the same *principle, that a plea of set-off is to be treated as a cross action. Therefore, when the Statute of Set-off talks of mutual debts, the statute of 9 Geo. 4 would apply. A great deal of reliance was placed by the Lord Chief Baron on the fact that s. 4 enacts that the recited acts and this act shall be deemed to apply to set-off; and the words are certainly general and large enough to include s. 5, and I do not see why they should not bear this construction, so as to carry out the decision in *Remington v. Stevens* (*). On the whole, therefore, I am of opinion that the decision of the Queen's Bench Division was right.

POLLOCK, B.: I am of the same opinion. Our decision may well be founded on the decisions which have taken place on the Statute of Limitations and the Statute of Set-off. No doubt those are cases in courts of first instance, but this construction has been uniformly put on the statutes, commencing as far back as *Remington v. Stevens* (*), which was followed in *Chapple v. Durston* (*), and in *Francis v. Dodsworth* (*), where, in the passage read by Lord Justice Mellish this is pointed out. I therefore concur in holding, on that ground, that s. 5 applies to set-off, although the words of the section itself *prima facie* apply only to an action. As to the cases on attorneys' bills, all that is

(1) 11 C. B. (N.S.), 855; 31 L. J. (C. P.), 206.

(2) 4 C. B., 202; 17 L. J. (C.P.), 185.

(3) 2 Str., 1271.

(4) C.B., 202, 220; 17 L. J. (C.P.), 185, 7.

(5) 1 C. & J., 1.

(6) 4 C. B., 202, 220; 17 L. J. (C.P.), 185, 187.

required by the statute of attorneys before bringing an action relates to the bringing of the action, and not to the cause of action; and the analogy is rather to statutes which require notice of action, and not to an enactment like the present.

Judgment affirmed.

Solicitors for plaintiff: *West & King.*

Solicitor for defendant: *W. Tatton.*

See 13 Eng. Rep., 73 note.

The deed of an infant purporting to convey lands operates to transmit the title, and is voidable only, not void: *Irvine v. Irvine*, 9 Wallace, 617; *Dixon v. Merritt*, 21 Minn., 196; *Scranton v. Stewart*, 52 Ind., 68; *Law v. Long*, 41 Ind., 595; *Wetmore v. Kissam*, 3 Bosw., 327; *Doe v. Woodruffe*, 7 Upper Can. Q. B., 332.

See *Tucker v. Moreland*, 10 Peters, 58; *McIlvane v. Kadel*, 3 Rob., 429.

So a mortgage: *Palmer v. Miller*, 25 Barb., 399.

A mortgage upon land given by an infant is voidable only, not void; but it may be avoided during infancy, and defending by guardian an action of ejectment brought by the mortgagee is a sufficient act of avoidance: *Gilchrist v. Ramsay*, 27 Upper Can. Q. B., 500; *Chandler v. Simmons*, 97 Mass., 508; *Gibson v. Soper*, 6 Gray, 279.

Declaration on defendant's covenant to pay off a mortgage to one L., on land conveyed by him to the plaintiff, alleging non-payment, and a sale of the land under the mortgage to one M., who evicted the plaintiff. Plea, on equitable grounds, that, before the mortgage fell due, defendant, at the plaintiff's request, advanced to him the money required to pay it off, which the plaintiff promised and gave his bond to the defendant to do; that afterwards the plaintiff, owing the defendant \$400, gave him a mortgage therefor upon the same land; that when the mortgage to L. fell due, the plaintiff being unable to pay it off according to his bond, it was agreed by all parties that L. should sell one half of the land for more than her mortgage, pay the plaintiff the surplus and release to the plaintiff the other half; that L. accordingly sold half the land to M., and released the other half to the plaintiff by deed, in which the defendant joined, which deed the plaintiff accepted, and

L. also paid to the plaintiff the balance of the purchase-money received for the other half, above L.'s mortgage. Replication, that the plaintiff when all these transactions took place was an infant, by reason whereof his alleged bond and mortgage were voidable, and that he has avoided the same. Held, that the replication was good, for that there was nothing alleged in the plea to which the plaintiff was prevented from setting up his infancy as an answer, and he might avoid the bond and mortgage whenever they were relied upon against him: *Gallagher v. Gallagher*, 30 Upper Can. Q. B., 415.

A deed of bargain and sale made by A., when an infant, is not absolutely void but voidable by him, either before or after he becomes of age. The bringing of ejectment by A. to regain possession of the land, contrary to his deed, is so completely an avoidance of the deed, that it cannot afterwards be confirmed or set up by any subsequent deed or act of A.: *Doe v. Woodruffe*, 7 Upper Can. Q. B., 332.

Where an infant enters into a contract for the purchase of property, and performs work in part payment of the price, but avoids the contract on arriving at full age, without having received anything under it, he may recover for the work on a *quantum meruit*: *Medberry v. Watrous*, 7 Hill, 110, overruling *McCoy v. Hoffman*, 8 Cowen, 84; *De Rocher v. Continental Mills*, 58 Maine, 217, reviewing several cases and showing they were overruled.

See *Aldrich v. Abrams*, 8 N. Y. Leg. Obs., 128, *Lalor's Supp. to Hill & Denio*, 423, Supreme Court, N. Y., 1844, *Nelson, Bronson and Cowen, JJ.*; *Dunton v. Brown*, 21 Mich., 182.

The personal representative of an infant may ratify or disaffirm a contract of an infant: *Shropshire v. Burns*, 46 Ala., 108.

It has been held that where an in-

fant during minority assigned a contract for the conveyance of real estate, his assignee could not enforce specific performance of such agreement: *Carrell v. Potter*, 28 Mich., 377.

This case, we think on this question, is not sound law. The contract as to the infant was clearly voidable and not void. One party to the contract had no right to repudiate it on account of the infancy of the other: 13 Eng. R., 73 note.

In Upper Canada where the defendant, a minor, purchased an estate and gave the vendor a mortgage for the purchase-money, which was afterwards assigned to the plaintiff; on coming of age the defendant repudiated the mortgage, but adopted the purchase, by bringing an action to recover possession: Held, by the Court of Chancery, that the mortgage, being the deed of an infant, was absolutely void. But it was also holden that the mortgage being void, a lien for the purchase money resulted to the vendor, and that such lien passed to the plaintiff by the assignment of the mortgage: *Grace v. Whitehead*, 7 Grant's Chy., 591.

This case was undoubtedly correctly decided, but it is clearly contrary to the current of decisions so far as it holds the mortgage of an infant to be void and not voidable. The same court subsequently so held in *Miller v. Ostrander*, 12 Grant's (U.C.) Chy., 349.

A conveyance after majority to a third person, and an entry by the grantee under such conveyance, operate as a disaffirmance of a minor's deed: *Prout v. Wiley*, 28 Mich., 164; *Dixon v. Merritt*, 21 Minn., 196; *Wetmore v. Kissam*, 8 Bosw., 327.

But see *Law v. Long*, 41 Ind., 596; *Boal v. Mix*, 17 Wend., 596; *Tucker v. Moreland*, 10 Peters, 58; *Palmer v. Miller*, 25 Barb., 399; *Slater v. Brady*, 14 Irish Com. Law Rep., 61; *Doe v. Woodruffe*, 7 Upper Can. Q. B., 332.

The execution of a deed to a third person, after majority, of real estate mortgaged during infancy, without referring to the mortgage, will not amount to a repudiation of it. Where the contrary is not expressed, the intent of the deed will be deemed to be that the grantee shall take subject to any prior mortgage: *Palmer v. Miller*, 25 Barb., 399.

Although it is not necessary to the

affirmation of an infant's voidable deed that there be an act of affirmance by him, after he becomes of age, as solemn in character as the original act itself, still mere acquiescence, without anything else, is not generally sufficient evidence of affirmance: *Irvine v. Irvine*, 9 Wallace, 617; *Carrell v. Potter*, 28 Mich., 377; *Dixon v. Merritt*, 21 Minn., 196; *Tucker v. Moreland*, 10 Peters, 58.

See *Delano v. Blake*, 11 Wend., 83, discussed in *Henry v. Root*, 33 N. Y., 551.

The mere delay or neglect, after majority, of one who, when a minor, has executed a deed of lands, to make an actual disaffirmance of the deed by entry or conveyance, in the absence of any circumstances of equitable estoppel, will not operate as an affirmance or confirmation of the deed until the time limited by the statute of limitations for bringing an action has elapsed; the question in such case is merely one of the time within which an action may be brought: *Prout v. Wiley*, 28 Mich., 164. See 12 Eng. Rep., 377 note; *Dixon v. Merritt*, 21 Minn., 196; *Scranton v. Stewart*, 52 Ind., 68.

But see *Scranton v. Stewart*, 52 Ind., 68, 92, requiring a disaffirmance within a reasonable time.

To same effect in Iowa, by statute: *Weaver v. Carpenter*, 42 Iowa, 343, 347; *Jenkins v. Jenkins*, 12 Iowa, 195.

Where an infant purchases lands and subsequently, before his majority, sells the land, his retention of the proceeds of such sale after he becomes of age, is not such an affirmance of his contract, as to render valid against him an obligation given by him as a consideration for the land: *Walsh v. Powers*, 43 N. Y., 23, reversing 54 Barb., 550, 36 How. Prac., 289, 35 How., 279; *Carrell v. Potter*, 28 Mich., 377; *Dixon v. Merritt*, 21 Minn., 196; *Law v. Long*, 41 Ind., 586.

But see 12 Eng. Rep., 382 note, and cases cited; *Parmalee v. McGinty*, 52 Mississippi, 475; *Scranton v. Stewart*, 52 Ind., 68.

Where an infant buys land subject to a mortgage thereon, which, in and by the deed she covenants to pay as a part of the consideration of the conveyance, and subsequently, but before she becomes of age, she conveys the

land to another (for a larger price), and retains and enjoys the proceeds of such sale for several years after she attains her majority, she is not liable upon her covenant to pay the mortgage: *Walsh v. Powers*, 43 N. Y., 23, reversing 54 Barb., 550, 36 How. Prac., 289, 35 How. Pr., 279; *Dixon v. Merritt*, 21 Minn., 196.

A sale made by an infant is not ratified by mere acquiescence after he becomes of age; there must be some affirmative act.

Where the infant has spent the consideration before becoming of age, restitution thereof cannot be exacted as a condition to a rescission of the sale on his part: *Green v. Green*, 4 N. Y. Weekly Digest, 570, N. Y. Court of Appeals (affirming 7 Hun, 492); *Bool v. Mix*, 17 Wend., 120; *Tucker v. Moreland*, 10 Peters, 58; *Chandler v. Simmons*, 97 Mass., 508; *Gibson v. Soper*, 6 Gray, 279; *Bartlett v. Drake*, 100 Mass., 174; *Cone v. Burton*, 32 Mich., 30; *Carpenter v. Carpenter*, 45 Ind., 142; *Bartlett v. Drake*, 100 Mass., 174; *Bassett v. Brown*, 105 Mass., 551, 558; *White v. Branch*, 51 Ind., 210.

But see *Bartholomew v. Finnemore*, 17 Barb., 428.

So an infant person: *Gibson v. Soper*, 6 Gray, 279.

As to what amounts to a ratification by an infant, see *Root v. Henry*, 33 N. Y., 526; *Walsh v. Powers*, 43 N. Y., 23; *Irvine v. Irvine*, 9 Wallace, 617; *Carrell v. Potter*, 23 Mich., 377; *Scranton v. Stewart*, 52 Ind., 68; *Ackerman v. Runyon*, 1 Hilton, 169; *Bigelow v. Grannis*, 4 Hill, 206; *Bay v. Gunn*, 1 Den., 108.

Serving a notice of disaffirmance is sufficient disaffirmance: *Scranton v. Stewart*, 52 Ind., 68.

See *Tucker v. Moreland*, 10 Peters, 58.

Remaining in possession of real estate and selling it after arriving at majority is a ratification: *Lynde v. Budd*, 2 Paige, 191.

An acknowledgment and redelivery of a mortgage after majority is a sufficient ratification. It relates back to the original delivery, and cuts off a conveyance executed after the making, and before the acknowledgment of the mortgage: *Palmer v. Miller*, 25 Barb., 399.

Any ratification or affirmance of a clear and unequivocal character, after

arriving at majority, showing an intention to affirm the deed of an infant, is sufficient: *Irvine v. Irvine*, 9 Wallace, 617; *Scranton v. Stewart*, 52 Ind., 68.

If an infant bring suit, after majority, to enforce an agreement, this would, in itself, be an act of affirmance: *Carrell v. Potter*, 23 Mich., 377.

But see *Law v. Long*, 41 Ind., 596-602, where it is held that the infant must disaffirm by some proper act before suit. See also *Bool v. Mix*, 17 Wend., 120; *Tucker v. Moreland*, 10 Peters, 58; *Wetmore v. Kissam*, 3 Bosw., 327; *Slater v. Brady*, 14 Irish Com. Law Rep., 61.

But a suit by an assignee claiming under an assignment from him, made during his minority, has no such effect: *Carrell v. Potter*, 23 Mich., 377.

Where an infant has purchased real estate, and has taken and continued in possession after becoming of full age, and has exercised acts of ownership over the same, he will be deemed to have ratified the contract of purchase: *Henry v. Root*, 33 N. Y., 526; *Walsh v. Powers*, 43 N. Y., 26.

See *Scranton v. Stewart*, 52 Ind., 68; *Delano v. Blake*, 11 Wend., 85, discussed in *Henry v. Root*, 33 N. Y., 551.

Where an infant, having come of age and entered into a partnership with third persons, took a lease for his firm of one part of the property which as an infant he had conveyed, from the person to whom he had so conveyed that part with other parts, the lease is proper to go to the jury, on a suit by the infant for such other parts alone, to show an affirmance of his deed for the whole. With such evidence before the jury the court rightly refused to charge that the evidence showed no affirmance. Whether it did show an affirmance or not was, with this lease before them, a question of fact for the jury: *Irvine v. Irvine*, 9 Wallace, 617.

An exchange of lands by an infant is not void, but voidable only, and as such may be rendered valid by acts of confirmation. When, therefore, a party said to have been under age and intoxicated when he made an exchange of lands, continued, after coming of age, in possession of the property received in exchange, and afterwards sold or exchanged it for other property, it was held to be such confirmation as barred those claiming under him from

impeaching the transaction: *Miller v. Ostrander*, 12 Grant's (U.C.) Chy., 349.

Where there has been a sale of an infant's interest in the estate of his ancestor, and the infant after his majority has knowingly received from the party that he is aware made the purchase and claimed title to his interest in the estate, the amount representing his interest therein, such person so receiving such amount has no equity to recover of the purchaser any portion of the estate for which he has received an equivalent: *Price v. Winter*, 15 Florida, 67.

See also 12 Eng. Rep., 382 note; *Parmales v. McGinty*, 52 Mississippi, 475.

An infant cannot retain the benefits of his contract, and thus affirm it, *after becoming of age*, and yet plead infancy to avoid the payment of the purchase-money: *Henry v. Root*, 33 N. Y., 526; *Walsh v. Powers*, 43. N. Y., 23, 26.

See *Law v. Long*, 41 Ind., 600.

If when an infant, disaffirms a contract, he have property *in his possession* which he received under the contract, repudiated the former owner, is entitled thereto whatever its condition. If it have been injured by the infant the remedy for the injury is by an action for the tort: *Carpenter v. Carpenter*, 45 Ind., 142; *White v. Branch*, 51 Ind., 210.

If an infant on disaffirming a contract have property *in his possession* which he received under it, the former owner, on demand thereof, may maintain trover or replevin therefor: 1 Pars. on Cont. (6th ed.), 321-2; *Kitchen v. Lee*, 11 Paige, 107; *Skinner v. Maxwell*, 66 N. C., 45; *Heath v. West*, 28 N. H., 101; *Tyler on Infancy and Coverture*, 77.

An infant prevailing on the plea of infancy, in an action on a promissory note given by him for a chattel which he had obtained by fraud, and *refused to deliver on demand*, is still liable to an action of tort for the conversion of the chattel, although he had sold it before the demand was made upon him: *Walker v. Davis*, 1 Gray, 506.

An infant who receives property under a contract of sale to him, and then surrenders it to the seller, intending to give up all his interest in it, cannot afterwards avoid such surrender, and retake the property from the possession

of the seller: *Edgerton v. Wolf*, 6 Gray, 453.

The current of authority seems to be that an infant may disaffirm his contract during minority: 1 Pars. on Cont. (6th ed.), 294, 321-8, 333; *Stafford v. Roof*, 9 Cowen, 626, reversing 7 Cowen, 179; *Carpenter v. Carpenter*, 45 Ind., 142.

See *Wetmore v. Kissam*, 3 Barb., 321; *McIlvane v. Kadel*, 8 Rob., 429; 30 How. Prac., 193; *Doe v. Woodruffe*, 7 Upper Can. Q. B., 332; *Shropshire v. Burns*, 46 Ala., 108.

And to contrary: *Dunlon v. Brown*, 31 Mich., 182; *Ludwig v. Stewart*, 33 Mich., 30.

Except it relate to real estate: 1 Pars. on Cont. (6th ed.), 322; *Wetmore v. Kissam*, 3 Bosw., 327; *McIlvane v. Kadel*, 3 Rob., 429, 432, 30 How. Prac., 130.

But see *Doe v. Woodruffe*, 7 Upper Can. Q. B., 332.

Which includes a lease: *Hartshorne v. Early*, 19 Upper Can. Com. Pl., 139, citing *Maddon v. White*, 2 Term Rep., 161; *Slator v. Trimble*, 14 Irish Com. Law Rep., 342; *Woodfall's Land and Ten.*, 40-1, and disapproving *Coke, Litt.*, 380 b.

As to a marriage contract under the age prescribed by law, see 1 Bish. Mar. and Div. (5th ed.), §§ 148-150.

If a settlement is made by a member of a firm with an insurance company, for a loss occasioned to property of the firm by a peril insured against, the firm cannot maintain an action on the policy without first restoring, or offering to restore, what has been received under the settlement, although the partner who made the settlement was a minor, and the settlement was effected through the fraud of an agent of the company: *Brown v. Hartford, etc.*, 117 Mass., 479.

A legacy was paid by an executor of a will to B., a minor. Some years after, when B. had attained his majority, he called in the probate of this will, and opposed the validity thereof, on the ground of the incapacity of the deceased, but refused to bring in the legacy: Held, that the payment having been made to a minor, and being consequently invalid, B. could not be compelled by the court to bring it in: *Goddard v. Morton*. 5 N. Y. Leg. Observer, 199, *Arches Court*, Sir H. Jenner

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Fust, substantially overruling Phillips v. Paget, 2 Atkins, 81. The case is not reported in the regular series, 1 Robertson's Ecclesiastical Reports.

The rule would have been otherwise had the legatee been an adult: 12 Eng. Rep., 379 note; Holt v. Rice, 54 N. H., 398.

D.'s father died in 1847, having first made his will purporting to devise all his real estate to his wife in fee; this will was not executed in proper form, and therefore D. became entitled to the land as heir at law. Three months before D. became of age, he agreed with P. for the sale to him of the real estate for a valuable consideration. A conveyance to P. was prepared by D. and executed by his mother, the devisee under his father's will, D. being the witness to it. P. afterwards sold and conveyed his interest, and D. brought ejectment against the purchaser. On a bill filed to restrain this action of ejectment, it was shown that D. had at various times acquiesced in the sale after he became of age: Held, that D.'s conduct with reference to the sale to P. was fraudulent, and was to be considered as an assertion that his mother was entitled as devisee in fee although he was then not of age, and that such conduct and his subsequent acquiescence after his attaining majority estopped him from denying the validity of the sale; and he was enjoined from proceeding with the action of ejectment, and ordered to execute a

conveyance to the plaintiff, the vendee of P.: Leary v. Rose, 10 Grant's (U.C.) Chy., 346.

But see on question of fraud, Tucker v. Moreland, 10 Peters, 58.

As to the effect of one becoming subscribing witness to an instrument, without proof that he knew its contents, see 12 Eng. Rep., 380 note.

An appearance by an infant in a suit to foreclose a mortgage thus assumed by her, as a party defendant, and a judgment of foreclosure against her in that suit are no bar, to her setting up her infancy as a defence in an action against her by her grantor to recover the amount of a judgment against him for a deficiency, which he had been obliged to pay: Walsh v. Powers, 43 N. Y., 23, reversing 54 Barb., 550, 36 How. Pr., 289, 35 How. Pr., 279; Dixon v. Merritt, 21 Minn., 201, and cases cited.

See also Carrell v. Potter, 23 Mich., 377; Chandler v. Simmons, 97 Mass., 508.

Where an infant defendant in an action for foreclosure is served with process, but no guardian *ad litem* is appointed, and judgment is taken by default, the judgment is not void but voidable. In such case where judgment is obtained by fraud and collusion, an action may be maintained on the part of the infant to set it aside as to him: McMurray v. McMurray, 66 N. Y., 175.

[1 Queen's Bench Division, 470.]

April 26, 1876.

*SHAND and Others v. BOWES and Others. [470]

Mercantile Contract, Construction of—"300 Tons of Rice to be shipped during the Months of March ^{and} or April."

Defendants, by a contract, dated London, 17th of March, bought of plaintiffs "about 600 tons of Madras rice, to be shipped at Madras or coast for this port during the months of March ^{and} or April, per Rajah of Cochin." The 600 tons filled 8,200 bags, of which 7,120 were shipped between the 23d and 28th of February, and the last bill of lading was signed on the latter day; of the other 1,080 bags, 1,030 were put on board on the 28th of February, and the remaining 50 on the 3d of March, and the bill of lading signed on that day. Defendants having refused to accept the rice:

Held, that, nine-tenths having been completely shipped in February, the rice was not shipped in March or April, and the defendants were not bound to accept it.

Alexander v. Vanderzee (3 Eng. Rep., 379,) distinguished.

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DECLARATION for not accepting a cargo of rice pursuant to a contract dated London, 17th of March, 1874, by which defendants bought of plaintiffs "the following Madras rice, to be shipped at Madras or coast for this port during the months of March ^{and}_{or} April, 1874, about 300 tons, per Rajah of Cochin."

Second count on a similar contract of the 24th of March, 1874. Plea 5: That the rice was not shipped during the months of March ^{and}_{or} April, 1874. Issue joined.

At the trial before Brett, J., at the London Michaelmas sittings, 1875, it appeared that the defendants bought of plaintiffs 600 tons of rice by bought and sold-notes, dated London, 17 and 24 March, 1874, respectively, for 300 tons each, in the terms set out in the declaration.

The 600 tons filled 8,200 bags, and the 8,200 bags were shipped, and bills of lading given for them as follows:

1780	bags,	bills of lading	given	Feb. 23
1780	"	"	"	Feb. 24
3560	"	"	"	Feb. 28
1080	"	"	"	March 3

and of these 1,080 bags, all but fifty were put on board on the 28th of February. The fifty were put on board on the 3d of March, and the bill of lading signed on that day.

471] *Evidence was given that rice shipped in February would be the spring crop, and would be equally as good as rice shipped in March or April. Contradictory evidence was given as to whether such a shipment as above could be a March shipment.

The case of *Alexander v. Vanderzee* (1) was relied on for the plaintiffs.

The learned judge left the question to the jury, was this cargo, as a cargo, a shipment in March ^{and}_{or} April in the ordinary business sense of the term? adding that, if it was for him, he held the meaning to be, that if the loading had been conducted consecutively, with ordinary and reasonable dispatch, and was completed in March or April, so that the vessel, so far as the loading of the cargo was concerned, might sail in March or April, it was sufficient.

The jury said they agreed with the construction which the judge had put where the name of the vessel is given in the contract.

A verdict was accordingly taken for the agreed sum of £1,636 18s., and judgment was entered for the plaintiffs, with leave to move to enter judgment for the defendants.

(1) Law Rep., 7 C. P., 530.

A notice of motion was given accordingly, on the grounds : 1. That there was no evidence to support a verdict for the plaintiffs, and the judge ought to have directed a verdict for the defendants; 2. That there was error in saying that the rice was shipped during the months of March ^{and}_{or} April within the ordinary meaning of the words of the contract.

The defendants also moved for a new trial, on the ground that the verdict was against the weight of evidence.

This order was refused by the Queen's Bench Division, but was afterwards granted in the Court of Appeal, cause to be shown in the Queen's Bench Division.

April 25. *Benjamin*, Q.C., moved to enter judgment for the defendants: On the undisputed facts the defendants are entitled to judgment. It is impossible to say that the rice was shipped in March or April. Out of the 600 tons all but four tons were shipped in February, so that this would clearly have been a *February shipment, and [472 cannot, therefore, be a March shipment. *Alexander v. Vanderzee* (') was cited by the plaintiffs, and acted upon by the learned judge; but the facts there were different, and it is therefore not binding on the court.

Cohen, Q.C., and *J. C. Mathew*, for the plaintiffs: The construction put by the judge on the contract was the right one. The surrounding circumstances must be looked at in giving a meaning to the contract; and it was an undisputed fact that rice shipped in February would be the spring crop, and would be as good, if not better, than a March shipment. The defendants were offered substantially what they contracted for, viz., a cargo of rice shipped in such time as that the vessel could sail in March or April. And it is to be observed that the ship was named by which the rice was to come, so that this was the material part of the contract; and the difference of a week or two in the shipment does not go to the root of the matter, and is immaterial as a condition precedent. *Alexander v. Vanderzee* (') is really undistinguishable.

[BLACKBURN, J.: We will consider the case, and will probably give judgment in the morning.]

Cir. adv. vult.

April 26. BLACKBURN, J.: We have considered this case, and have come to the conclusion that the motion for judgment for the defendants should be acceded to, and therefore the judgment will be entered for the defendants.

The case turned upon this: There were two contracts,

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each for 300 tons of Madras rice, to be shipped at Madras or the coast during March ^{and}/_{or} April, 1874; and consequently the defendants, if the rice was properly shipped, either in March or April, were bound to take it, but if it was shipped in February, though the rice would be equally good, and would be just as advantageous rice for them, it was not what they bargained for, and they were not bound to take it. So that the question is, whether the rice had been shipped in March within the meaning of the contract. There is a case of *Alexander v. Vanderzee* (¹), in the Court of Exchequer Chamber, on which my Brother Brett acted principally; *and which is undoubtedly binding upon us; and we are, therefore, by no means to be supposed to be dissenting from it. In that case there was a contract for a cargo of maize for shipment in June ^{and}/_{or} July, old style. I may observe we do not think there is any difference, or, at all events, any substantial difference, between the phrase "a cargo for shipment in June ^{and}/_{or} July," and "a cargo to be shipped in March ^{and}/_{or} April;" as far as this goes, we think the phrases mean the same thing. Two cargoes had been shipped, and in each case the commencement of the shipment was in May, and the shipment went on and was completed in June, and then bills of lading were signed in June for the shipment which had commenced in May and finished in June. The case was tried before my Brother Brett, who asked the jury whether, in the ordinary business sense, those shipments were June shipments—though they had begun in May, being completed in June, were they June shipments? The jury found that they were; and in the Court of Error the majority of the judges (they were not all agreed) thought that it was properly a question for the jury, and the court held, the jury having found that these were June shipments, that they were June shipments, and that the defendant was bound to take the maize.

Now, in the present case, if the facts were the same, we should be undoubtedly bound to follow that decision, and to say this was a question for the jury, and on the finding of the jury we should have to decide whether or no it was satisfactory. But the undisputed facts appear to be these: Out of the 8,200 bags of rice, 1,780 bags were shipped in February, and on the 23d of February that shipment was completed, and a bill of lading was signed. Another lot of 1,780 bags was shipped, and a separate bill of lading taken for them, and on the 24th of February that bill of lading

(¹) Law Rep., 7 C. P., 530.

was signed. Then there was another shipment of 3,560 bags made; that was completed on the 28th of February, and the bill of lading was signed on that day. So that these three parcels, making very nearly nine-tenths of the whole quantity, were in every sense of the word shipped in February, the shipment being completed and the bill of lading signed in February. The next parcel of 1,080 bags is in a different position. The shipment was *com- [474 menced in February, and the greater part of it, namely, 1,030 bags, was shipped and put on board in February, and the shipment of that parcel was not completed until the 3d of March, fifty bags being put on board in the month of March, and then the bill of lading was signed on the 3d of March. Now, if the shipment of all four parcels had been like that last, commenced in February, but completed and the bills of lading signed in March, the case would have been, as far I perceive, identical with the case of *Alexander v. Vanderzee*(¹); and we should have been bound to say this was a question for the jury, and being left to the jury, and the jury having found for the plaintiffs, we should have to determine whether it was a satisfactory verdict. But in the view we take of it, it is not necessary to decide that at all, for the three earlier parcels were, in every sense of the word, completely shipped in February. They were put on board in February, the loading was completed in February, and the bills of lading were signed in February; and if this had been a contract for a February shipment instead of a March shipment, there could be no doubt that these three parcels would have been in every sense of the word shipped in February. That being so, it does not become necessary to consider whether or not the last parcel, the shipment of which was completed in March, and the bill of lading signed in March, was shipped in March or not, for the defendants, when they bargain for about 600 tons to be shipped in March, are not bound to accept four tons shipped in March and 596 that were shipped in February. They are entitled substantially to have the whole quantity contracted for shipped in March, and consequently, upon that view, the defendants are entitled to the verdict, upon the undisputed facts.

We think it right to say that, had it become necessary to determine whether or not the verdict of the jury was satisfactory, looking at the evidence, which seems to have been strong on the one side—without saying whether it was wrong—we might have desired, in our discretion, to give a

(¹) Law Rep., 7 C. P., 530.

fresh jury an opportunity of saying what view they took of the matter; but in the view we take of it, that the large 475] proportion of the shipment was *clearly a February shipment, we think the defendants are entitled to judgment.

MELLOR, J.: I am of the same opinion entirely, and for the same reasons. I think in no sense could nine-tenths of these bags of rice which were put on board be said to be otherwise than rice shipped in February; the loading having been completed in February, and the bills of lading given in February. Therefore I certainly entirely concur in the opinion of my Brother Blackburn with regard to the construction of the contract. I only wish to guard myself from it being supposed that I in any sense depart from what was done in the case of *Alexander v. Vanderzee*(¹). The facts distinguish that case from the present, and it is unnecessary, therefore, to do more than to say, if the facts had been the same I should have felt bound by it, not merely because it was a binding authority, but because I agree with the opinion that the facts there raised a question for the jury.

In the present case I am of opinion that we ought to order the verdict to be entered for the defendants.

LUSH, J.: I entirely concur in the judgments of my learned Brothers, and I have nothing to add.

BLACKBURN, J.: As to the rule for a new trial, as far as this court is concerned, we give no decision, and it will drop.

Judgment for the defendants.

Solicitors for plaintiffs: *Stevens, Wilkinson & Harries.*

Solicitors for defendants: *Lattey & Hart.*

(¹) Law Rep., 7 C. P., 530.

[1 Queen's Bench Division, 476.]

May 5, 1876.

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*ROBERTS V. PAGE and Another.

Friendly Society—18 & 19 Vict. c. 63, s. 19—21 & 22 Vict. c. 101, s. 7—*Proceeding touching the Right of the Society—Action against Secretary.*

By the Friendly Societies Act (18 & 19 Vict. c. 63), s. 19, the trustees of any society are authorized to bring or defend any action, suit, or prosecution in law or equity, touching or concerning the property, right, or claim to property of the society.

By s. 7 of 21 & 22 Vict. c. 101, in any proceeding under this act or the above act against a society, it shall be sufficient to make the secretary or other officer of the society, at the time of the plaint or complaint, the defendant.

Proceedings having been taken by a member of a society in a county court to enforce a claim against the society, a compromise was come to between the

plaintiff, the solicitor of the member, and the society, by which, *inter alia*, the society promised to pay the plaintiff certain costs and charges. These costs and charges not having been paid, the plaintiff sued the secretary of the society in a superior court:

Held, that this was a proceeding within s. 19 touching the right of the society, and was properly brought against the secretary under s. 7.

ACTION against J. F. Page, secretary of the Eye and West Suffolk district of the Ancient Order of Foresters Friendly Society, and W. Baker, secretary of Court Brave Old Oak, No. 3,658, held at Mendlesham, a branch of the said Ancient Order of Foresters Friendly Society, established in pursuance of the statutes relating to friendly societies, the rules of which society have been duly certified by the registrar of friendly societies in England: that before and at the time of the making of the agreement hereinafter mentioned, one T. Hipperson, being a member of the society, had preferred a claim before the appeal committee thereof, and, upon the neglect and refusal of the said committee to hear the claim, had, according to the statute in that behalf (¹), made an application for relief against the said society to the county court of Suffolk at Stowmarket, and had employed the plaintiff to act as attorney and solicitor on his behalf in and about preferring the said claim before the said committee, and in and about making and conducting the said application to the said county court and transacting all necessary and proper business in connection therewith, and the plaintiff acting as such attorney and solicitor as *aforesaid*, had incurred divers costs and expenses [477 in and about preparing the said claim and conducting the said application as *aforesaid*. Whereupon it was agreed by and between the plaintiff and the society that, in consideration that the plaintiff would advise Hipperson to withdraw from the application to the county court, and would procure a stay of proceedings therein, the *aforesaid* claim of Hipperson should be forthwith heard by the committee of the society, and that the society would pay the costs and expense then already incurred by the plaintiff in and about preferring the claim before the committee as *aforesaid*, and so much of the costs and expenses so incurred in and about conducting the application to the county court as should be ascertained and found to be payable upon a taxation as between party and party. The plaintiff did so advise Hipperson to withdraw from the application to the county court, and did procure a stay of proceedings therein. And a taxation was duly made as between party and party in respect of the costs and expenses as agreed.

(¹) See 18 & 19 Vict. c. 63, s. 41.

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Breach, non-payment of the £25 14s. 3d., the amount of such costs, &c.

Second count, repeating the allegations contained in the first count so far as they relate to the circumstances existing before and at the time of the making of the agreement therein mentioned. That thereupon it was agreed between the plaintiff and Arthur Frederick Vulliamy, on behalf of the society, as follows :

"Debenham, Suffolk, November 18th, 1874.

"A. F. Vulliamy, Esq., Ipswich.

"Hipperson v. Foresters Friendly Society.

"Dear Sir,—I have received and am obliged for your letter of the 17th inst. I have no wish to take this case into court if we can come to a satisfactory arrangement without. My client is a very poor man, and has been put to very heavy expenses, and if you will agree to pay my counsel's fees, with brief, which are already incurred, and my costs of attending the appeal committee of Mendlesham, with my client, Mr. Hipperson, on the 26th August last, and the costs as between party and party, and also undertake that the case shall be forthwith heard, I shall be happy to stay 478] further proceedings. I will come over to Ipswich *by the first train to-morrow morning from Stowmarket, and hope to be with you about half-past 10; but as it is market day at Stowmarket, must return very shortly, and hope your client will be in the way and a satisfactory arrangement completed. This letter is without prejudice.

"Yours truly,

"OSCAR W. ROBERTS."

"Ipswich, November 19th, 1874.

"O. W. Roberts, Esq., Solicitor, Debenham.

"A. O. F. v. Hipperson.

"I have seen my clients this morning, and they have instructed me to consent to your letter of the 18th inst. The appeal will be heard within three weeks, of which your client will have due notice.

"Yours truly,

"A. F. VULLIAMY."

This count then concluded like the first.

Demurrer and joinder.

Merewether, in support of the demurrer: It is only by force of the Friendly Societies Acts that an officer of a society can be sued. By s. 7 of 21 & 22 Vict. c. 101, "In any proceeding under the said recited act [18 & 19 Vict. c. 63] or this act against a society, it shall be sufficient to make

the secretary or other officer of the society, at the time of the plaint or complaint being entered or made, the defendant in such proceeding, by his name and the title of the office he holds in the society . . . ;" that refers only to plaint or complaint, and not to an action. By s. 19 of 18 & 19 Vict. c. 63, "The trustees of any such society are hereby authorized to bring, or defend, or cause to be brought or defended, any action, suit or prosecution in any court of law or equity, touching or concerning the property, right, or claim to property of the society for which they are such trustees; and such trustees shall, in all cases concerning the real or personal property of such society, sue and be sued, plead and be impleaded, in any court of law or equity, in their proper names, as trustees of such society, without any other description. . . ." It will be argued for the plaintiff that the secretary is substituted for the trustees by s. 7 of the *second act; but that is not so: s. 19 remains, and [479 applies to actions, while s. 7 applies to proceedings in the county court and before justices. But even if the secretary is to be taken as substituted for the trustees, this is not such an action as is contemplated by s. 19; for it simply relates to a contract compromising a law proceeding, and does not touch or relate to the real or personal property of the society.

[LUSH, J.: It is an action relating to the right of the society; the words are, "any action . . . touching or concerning the property, right, or claim to property of the society."]

"Right or claim to property" means right to property or claim to property, which this is not.

Loyd, for the plaintiff, was not called upon.

BLACKBURN, J.: I am of opinion that there must be judgment for the plaintiff. The friendly society had entered into a contract for the compromise on equitable terms of a pending proceeding against them. The plaintiff sues on that contract, being the attorney for the member who had commenced the proceedings against the society. Nothing is stated to show that the client might not have sued the society. The question is, how is the plaintiff to enforce the agreement? The friendly society is constituted under the statute, and by the enactments of the statute it is not everything that the society can do; but there are certain matters included in which the society has a concern, either relating to property or by which it is liable to have its funds taken away. By 18 & 19 Vict. c. 63, s. 19, "the trustees of such society are authorized to bring or defend

any action, suit, or prosecution in any court of law or equity, touching or concerning the property, right, or claim to property of the society; and such trustees shall and may, in all cases concerning the real or personal property of such society, sue and be sued in any court of law or equity in their own names." It seems to me that in this action the society is interested in a contract in which the right to property is concerned, and that it is not a matter *ultra vires*. Then s. 7 of 21 & 22 Vict. c. 101 says that, in any proceeding under the recited act or this act against a society, it shall be sufficient to make the secretary or other 480] officer the defendant. Is an action which would *be against a trustee under the first act a proceeding under that act? I think it is; and it is unnecessary to inquire whether this would be a proceeding under the second act. Judgment must, therefore, be for the plaintiff.

LUSH, J.: I am of the same opinion. Certain contracts are competent to the society to make. The employment of a solicitor seems to be contemplated by ss. 19 and 24. How is he to recover his costs? Surely he is not to be left without remedy. Practically it would be so, if he must sue every individual member. It must have been the intention of the act to do away with this difficulty, and to enable him to proceed against the officer of the society. It seems to me that the terms of s. 19 are wide enough to include the present case. "Right" means something beyond "property," or "claim to property."

FIELD, J.: It seems to be established that this contract was one which the society might lawfully enter into. The society is a fluctuating body, and such body having entered into the contract, the Legislature, to prevent the injustice which would ensue if there was nobody who could be sued but the members of the society at large, has given facilities by naming persons who may sue or be sued, viz., the trustees under the first act, for which the secretary or other officer is substituted in the second act. And they are to bring or defend any action touching or concerning the property, right, or claim to property of the society. The question is, whether that goes far enough to include the present case. The property of the society might certainly be affected in the present action; and therefore I think the action is rightly brought against the officer.

Judgment for the plaintiff.

Solicitor for plaintiff: *G. J. Brownlow.*

Solicitors for defendants: *Vulliamy & Co.*

We have statutes quite similar in many of the states, under which suits are brought by and against one or more of the officers of a joint stock company or association, consisting of more than a stated number of persons. As to such actions, see Moak's *Van Santvoord's Pleadings*, pp. 96-7, 123-4, 171.

It is not necessary that the individuals comprising the members of a voluntary association, consisting of more than seven associates, should be made parties to an action against it. The action is well brought against the president of the association, named as defendant: *Olery v. Brown*, 51 How. Prac., 92.

The president or treasurer of a joint stock company or association consisting of seven or more members, is, under the provisions of the act in relation to

suits by and against such companies (chap. 258, Laws 1849, amended by chapter 153, Laws 1853), and under the provisions of the state constitution relative to corporations (art. 8), to be regarded, for the purposes of the action against the company, substantially as a corporation sole: *Wescott v. Fargo*, 61 N. Y., 542, affirming 6 Lans., 321, 63 Barb., 349.

A member of a joint stock express company may maintain an action against it in the manner prescribed by said statute (i.e., against its president or treasurer), to recover for goods lost which were delivered to it for transportation, the same as if he was not connected with the company: *Wescott v. Fargo*, 61 N. Y., 542, affirming 6 Lans., 319, 63 Barb., 349.

See also 16 Eng. Rep., 778 note.

[1 Queen's Bench Division, 487.]

Jan. 28, 31, 1876.

*RUSTOMJEE V. THE QUEEN.

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Petition of Right—Money received by the Queen from foreign State on Account of Debts due from Subjects of that State to British Subjects—Statute of Limitations.

By a treaty between the Queen of England and the Emperor of China, the Emperor agreed to pay to the British government the sum of 3,000,000 dollars on account of debts due to British subjects from certain Chinese merchants, who had become insolvent, being largely indebted to British merchants. The money having been received by the British government:

Held, that a petition of right would not lie by one of the British merchants to obtain payment of a sum of money alleged to be due to him from one of the Chinese merchants.

The Statute of Limitations does not apply to a petition of right.

THIS case resembling somewhat the condition of affairs resulting from the recent Geneva arbitration between England and the United States, the head note is given to call attention to the case should it chance to be of interest to any member of the profession.

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[1 Queen's Bench Division, 499.]

May 2, 1876.

499] *DAWKINS V. PRINCE EDWARD OF SAXE WEIMAR.

DAWKINS V. WYNYARD.

DAWKINS V. STEPHENSON.

Abuse of Process of Court—Staying frivolous and vexatious Action—Groundless Action against public Officer.

Actions were brought, charging the defendants with conspiring to make, and making, false statements respecting the plaintiff, an officer in the army, to the commander-in-chief, whereby the plaintiff was placed on half-pay. Upon application to stay the actions as frivolous and vexatious, and an abuse of the process of the court, it was stated in the defendants' affidavits that the actions were for acts done by the defendants in the due course of their duty as members of a military court of inquiry, and this was not denied by the plaintiff:

Held, that the actions ought to be stayed, on the ground that *Dawkins v. Lord Rokeby* (14 Eng. R., 127; Law Rep., 7 H. L., 744), was a case directly in point that an action under such circumstances would not lie.

Castro v. Murray (13 Eng. R., 358; Law Rep., 10 Ex., 213) followed.

APPLICATIONS having been made at Chambers to stay these actions as frivolous and vexatious, and an abuse of the process of the court, they were referred to the court.

It was alleged in each action that the plaintiff was a lieutenant-colonel in the army and a captain in the regiment of Coldstream Guards, and that the defendant wrongfully and maliciously conspired with other persons, by falsely, and without any reasonable or probable cause, representing to the commander-in-chief that the plaintiff was unfit to command in the said regiment, to deprive the plaintiff of his rank of lieutenant-colonel, and of his commission as captain, and, in furtherance of the said conspiracy, the defendant and the said other persons did falsely and maliciously, and well knowing the same to be false, and without any reasonable or probable cause, represent to the commander-in-chief as aforesaid, whereby the plaintiff was deprived of his rank of lieutenant-colonel and of his commission as captain. A second count in each action varied the allegation of damage, by saying that the plaintiff was placed on half-pay, and was injured in his reputation as an officer, and was deprived of his rank and commission.

In support of the application to stay proceedings in each action, the defendant made an affidavit, stating in substance that, in February and March, 1865, he was a member
500] of a military court of *inquiry upon the conduct of

the plaintiff, then a lieutenant-colonel in the Coldstream Guards, which court, in the discharge of its official and judicial duties, reported, on the 29th of March, 1865, to the commander-in-chief, and that the action was brought for and in respect of the official and judicial acts done by the plaintiff as member of the court of inquiry, and for and in respect of no other matter or thing whatsoever; that when he became a member of the court he knew nothing of the plaintiff personally, and the allegations in the declaration, charging him with conspiracy and false representation, were without foundation.

In answer to the application, the plaintiff made in each action an affidavit, saying in substance that the action was not brought vexatiously or frivolously, or in abuse of the process of the court, but perfectly *bona fide* and to vindicate his position and character, and that he was prepared to support the same by evidence in his possession. The plaintiff's affidavits in the second and third actions contained also an express statement that the allegations in the declaration, charging conspiracy and false representation, were true and well founded.

C. S. Bowen, for the defendants in the first and second actions: The declarations disguise the real nature of the actions. When their real nature is looked at, they are found to be thoroughly untenable, the law being clearly settled by *Dawkins v. Lord Rokeby* (¹). The actions ought, therefore, to be stayed as frivolous and vexatious, and an abuse of the process of the court: *Castro v. Murray* (²).

Anstie, for the defendant in the third action.

H. Matthews, Q.C. (*Holl* with him), for the plaintiff: There is no precedent for staying such actions as these. The declaration in each shows a good cause of action.

[BLACKBURN, J.: But upon the affidavits it appears clearly that the actions are brought solely in respect of official and judicial acts done by the defendants as members of a military court of inquiry, and that there was no conspiracy save the necessary combination between the members of the court.]

*It is consistent with the affidavits that the members of the court agreed together, before entering on the inquiry, to get rid of the plaintiff; and, at all events, it has never been decided that the members of a military court of inquiry, acting maliciously, are privileged as the

(¹) Law Rep., 8 Q. P., 255; Law Rep., 7 H. L., 744. (²) Law Rep., 10 Ex., 218.

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members of a superior court would be. [He referred to *Dawkins v. Lord Paulet* (').]

BLACKBURN, J.: I think there is no doubt that we must stay these proceedings. With regard to the substantial merits of the matter, I think, notwithstanding all that Mr. Matthews has said, no one who reads the affidavits can doubt in the slightest degree what they are. The declaration contains a great many ugly words, no doubt; but the substance of it is that these different defendants conspired, combined, and agreed together to make a report to the commander-in-chief, which report is said to be false and malicious, and in consequence of which Colonel Dawkins was put on half-pay. If the matter had stood in that way alone, there would have been a cause of action, because the combining and confederating might have been done as any men might combine and confederate; but then the affidavits of each of the defendants distinctly say—I do not see how they could more distinctly say it—We were members of a court of inquiry. Until we were appointed, we knew nothing of Colonel Dawkins, heard nothing, and cared nothing about him; and the combination which is alleged in the declaration was solely that we, as members of the court of inquiry, having heard the evidence, met and agreed on what we would report, and did report accordingly, in the course of our judicial duty, and in no other way whatsoever. Now, upon that, if that is the true state of the case, we are of opinion that no cause of action can be shown. Colonel Dawkins does not meet that in the affidavit in reply. He does not pretend that any other representation was made than the report made judicially by the tribunal, or that there is any ground for saying there was any other combination than the necessary combination between the members of a court about to agree in a judgment or report. Upon that I can come to no conclusion, except that the defendants' affidavits are strictly true, and are admitted to be strictly true. Colonel Dawkins, *though he may be very wrong-headed to try and proceed with litigation which is utterly hopeless, will not say a word that is not perfectly true.

Then there is a more material thing to consider; and that is, have we, although we see the action is utterly groundless, a right to stop it summarily? I grant that is a jurisdiction which in all cases should be very carefully exercised by the court. But in *Castro v. Murray* (*), which was a stronger case than this, the Court of Exchequer stayed an

(') Law Rep., 5 Q. B., 94.

(*) Law Rep., 10 Ex., 213.

action against a public officer charging him with not performing a public duty, the action being absolutely without foundation. In the present case, although the declaration is freely sprinkled over with such words as "malice," "fraud," "combination," and the like, the substance of the action is that the defendants held a court of inquiry in obedience to Her Majesty's commands, as a military tribunal, and made a report. No action can lie against them for that; *Dawkins v. Lord Rokeby* (¹), in the House of Lords, which is similar in its circumstances, has determined the precise point. I therefore think we should stay these actions.

MELLOR, J.: I am of the same opinion. I wish to say no more about the merits of the case than this. No doubt Colonel Dawkins thinks he has been ill used, and has a very strong opinion that those who have decided against him in these inquiries have done so unfairly. He has brought various actions as the result of that opinion. It is to his credit that when these defendants swear that all they did,—the action they took, and the report they made,—was only in their judicial character, he does not deny it. They say there was no foundation for these proceedings but the judicial acts which they did as constituting a military tribunal; and according to all the authorities and all the dicta to be found in the various cases to which the litigation of Colonel Dawkins has given rise, that tribunal has been clearly shown to be a tribunal before which a witness or any other person in the course of his duty would be protected on the principle on which jurymen, witnesses, judges of all kinds, are protected. I am clearly of opinion that if this action were not stopped, Colonel Dawkins *would never get to [503 the jury. It is manifest upon the face of the declaration and the affidavits that it would come to a nonsuit. I think we should be allowing the time of the public and the court to be wasted if we did not interpose and take this course, having the authority to do so, as I consider, fully established by *Castro v. Murray* (²), which is a decision not only of the Court of Exchequer, but having the concurrence of all the judges of the Court of Exchequer, for all the judges of the Court of Exchequer were consulted before the opinion of my Brother Bramwell was pronounced.

BLACKBURN, J.: It is not a case for costs.

Rule absolute without costs.

Solicitors for plaintiff: *Gascotte, Wadham & Daw.*

Solicitors for defendants: *Duncan, Murton & Co.; Walters, Young & Co.; Vizard, Crowder & Anstie.*

(¹) Law Rep., 7 H. L., 744.

(²) Law Rep., 10 Ex., 218.

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The court unquestionably possesses the power to stay proceedings in a suit clearly and palpably vexatious, for every court possesses the inherent power to prevent an *abuse* of its process.

As matter of *practice*, however, it will not usually do so except in cases where the party against whom the motion is made does not substantially contradict the assertion of the moving party, as to the *facts* which entitle him to a stay on the ground that the action is frivolous and vexatious: 1 Tidd's Prac., (4th Am. ed.), 580, citing *Turner v. Taylor*, and *Brown v. Middleton*, two MS. cases; 3 Chitty's Gen. Prac. (Am. ed. 1836), 630, 634; 1 Burr. Prac. (2d ed.), 410; *Graham's Prac.* (2d ed.), 450, 553; 2 Wait's Prac., 618-19; *Burke v. Glover*, 21 U. C. Q. B., 290.

If the defendant dispute neither the cause of action, nor the amount of debt or damages claimed, he may move the court to stay the proceedings on payment of the debt and costs. And this may be done in all cases where, at common law, the defendant may pay money into court: 1 Burr. Prac. (2d ed.), 140, 409; 2 Wait's Prac., 618-19.

So where a person has a right of ac-

tion against several for one specific damage, recovers and receives a satisfaction from any one of them, the court, for the same cause, will stay proceedings in any action he may bring against the others: 1 Burr. Prac. (2d ed.), 410; *Graham's Prac.* (2d ed.), 553.

In some cases the court should stay proceedings without the payment of costs, as where an action is commenced without any previous demand, immediately on the maturity of a note, or immediately after the delivery of goods sold, or where an action is commenced for the purpose of making costs without giving the defendant an opportunity to pay the demand. In all such cases, the proceedings should be stayed, upon prompt payment of the debt into court, without costs: 2 Wait's Prac., 619; *Jefferies v. Sheppard*, 3 Barn. & Ald., 696; *Macintosh v. Haydon*, Ry. & Moody, 362.

In *Jefferies v. Sheppard* the action was brought against a sheriff for moneys collected soon after the receipt of the money without a previous demand.

[1 Queen's Bench Division, 507.]

Feb. 12, 1876.

507] *STRIBLEY V. THE IMPERIAL MARINE INSURANCE COMPANY.

Marine Insurance—Concealment—Non-communication by Agent of Assured.

In an action on a policy on the ship *Jessie* "at and from Mazagan to the United Kingdom," it appeared that the ship arrived at Mazagan on the 27th of December, 1873, and that the last news the assured, the plaintiff, had of her was a letter from her captain, dated the 9th of January, 1874, and received on the 21st of January, in which the captain said he had had a fine passage out and had commenced loading, but was delayed by bad weather, and would write again before sailing. The ship had, it afterwards appeared, lost an anchor by bad weather while at Mazagan, and the captain had made a protest on the 3d of January, but he did not mention the fact in this letter. The plaintiff insured on the 27th of February without communicating to the underwriters the letter of the 9th of January, but through his brokers gave them this information: "I do not know when she sailed, I have not had the sailing letter yet." The *Jessie*, after leaving Mazagan, was lost by the perils insured against. At the trial the sole defence relied upon was that the non-disclosure of the letter was the concealment of a material fact, and avoided the policy.

The judge left to the jury the questions: 1. Was the ship an overdue ship at the time of the insurance? 2. Was any material fact concealed, and, if so, what? 3. Was there any misrepresentation, and, if so, was it fraudulent? The jury answered all the questions in the negative, and a verdict was entered for the plaintiff:

Held, on a rule for a new trial on the ground of misdirection, and on a motion to enter judgment for the defendants, on the ground that the loss of the anchor was a particular average loss under the policy which ought to have been communicated, and that the plaintiff was responsible for the neglect of the captain in not communicating it, first, that judgment would not be entered for the defendants, as the point as to the anchor had not been distinctly taken at the trial, and, if it had, questions relating to it ought to have been left to the jury; and, secondly, on the authority of *Gladstone v. King* (1 M. & S., 85), that the particular average loss was an exception out of the policy, but the innocent non-communication of it by the agent of the assured did not avoid the policy; but that there must be a new trial, for it did not appear that the question had been distinctly put to the jury whether the contents of the letter of the 9th of January, and the fact that it was the last letter from the ship, would have influenced the mind of a reasonable underwriter, if communicated.

DECLARATION on two policies on the ship *Jessie*; one for £350, on the freight, and the other for £500 on ship valued at £2,000; alleging a total loss by the perils insured against.

Fourth plea, misrepresentation of material facts.

Fifth plea, concealment.

Joinder of issue.

At the trial before Grove, J., at the sittings in London in *December, 1875, it appeared that on the 10th of De- [508
cember, 1874, the brig *Jessie* sailed from Falmouth in ballast for Mazagan, a port in Morocco, and arrived there on the 27th. At Mazagan she was anchored in a somewhat open roadstead, for the purpose of having her cargo conveyed on board in lighters. While there a gale sprang up, and on the 1st of January, 1875, she was driven from her anchorage and lost her starboard anchor and chain, the captain making the usual protest. On the 9th of January, the master wrote a letter to the plaintiff, one of the part owners of the vessel, which was received at London on the 24th. This letter appeared to have been mislaid, but the plaintiff, from his recollection of it, said that in it the master stated that he had had a very fine passage out, that he had arrived on the 27th of December, and had begun loading, but had had very bad weather on the coast, and that he did not know when they would finish, but that he would write again. Plaintiff, however, stated positively that the letter said nothing about the vessel having been driven from her anchorage, and having lost her anchor. This letter was the last news which the plaintiff had of the vessel at the time of the insurance. On the 24th of February, the plaintiff having no further news of the *Jessie*, wrote to his London agents, ordering them to insure ship and freight, adding, "I do not know when she was ready to sail. I have not had the sailing letter yet." The agent showed this letter to the defendants' underwriter, who, on the 26th, signed the two policies on ship and freight, "lost or not lost, at and from Mazagan to port

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or ports of call ^{and}_{or} discharge in the United Kingdom." There was evidence that the average time of loading a vessel like the *Jessie* at Mazagan at the same time of year would be between fifteen and twenty days, and twenty-five to thirty days the probable duration of her voyage from Mazagan to England, and that the course of the post from Mazagan was irregular.

It was admitted that the *Jessie*, after leaving Mazagan, was lost by the perils insured against.

The case for the defence was based upon the suppression of the letter of the 9th of January, and evidence was called to show that it would have induced an underwriter to suspect that some casualty had happened to the vessel.

509] *The learned judge, in summing up the case, told the jury that he did not see that the fact that there was stormy weather on the coast on the 9th of January, and that the ship had lost an anchor, would make much difference as to the risk the ship ran when she afterwards sailed. With regard to the time which, at the date of the insurances, had elapsed since the vessel was heard of, the learned judge said: "A missing ship may be said to be one which is not heard of after the longest ordinary safe time in which the voyage insured is performed." But this is open to many exceptions. . . . I cannot myself see that there is much distinction, as far as the application of the thing goes, between a missing ship which a man may at once charge the underwriter with, or a missing ship which is overdue. A man is not bound, when a ship is a day late, to assume that a ship is an overdue ship, and inform the underwriters of it. It is a matter for the jury to take a reasonable view of it. One would expect, on the other hand, if the time becomes so long that there really is in a reasonable man's mind an apprehension that the ship may be lost, from the time since which she has sailed, that he ought to communicate it. That again would very much depend on the regularity of the passage, and the regularity of the post.

And, after saying that it must be considered whether the delay in the arrival of the vessel was such that the insurer ought to have known that he was imposing on the underwriters a speculative risk, the learned judge left to the jury the questions: First, was the ship an overdue ship at the time of the insurance? secondly, was any material fact concealed, and, if so, what? thirdly, was there any misrepresentation, and, if so, was it fraudulent? The jury answered all these questions in the negative, and a verdict was entered for the plaintiff, with leave for the defendants to move.

Notice of motion to enter the verdict for the defendants on the facts admitted at the trial having been given, and a rule *nisi* having also been obtained for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence,

C. Russell, Q.C., and *French*, for the defendants: First, the policy being "at and from Mazagan," the loss of the anchor was really a particular average loss within the meaning of the policy, *but it was never mentioned by [510 the captain in his letter, and for this concealment the plaintiff is responsible. The verdict ought, therefore, to be entered for the defendants, as the court has sufficient evidence to draw the inference that the loss of the anchor and the tempestuous weather at Mazagan would have influenced the defendants in their estimate of the risk. In *Fitzherbert v. Mather* (') the insurer's correspondent allowed the sailing letter to go several hours after he knew that the ship was lost, and that was held to vacate the policy. *Proudfoot v. Montefiore* ('), where the agent neglected to telegraph the loss of the vessel, which would have stopped the insurance, is to the same effect.

[BLACKBURN, J.: *Gladstone v. King* ('), where it was held that the non-disclosure by the agent without fraud of an accident to the vessel, did not vitiate the policy, but only amounted to an exception of the risk arising from that accident, is an authority against this contention. It appears, also, that the defendants' case was not put in this manner at the trial.]

Secondly, there was a misdirection. The learned judge lays stress upon what was passing in the mind of plaintiff when he gave the order to insure, and discusses the question whether the ship was then overdue. But this is not the point. What the jury had to consider was, whether the letter would have influenced the underwriter, acting as a reasonable man of business. [They referred to Duer on Insurance, vol. ii, pp. 419-427.]

Aspland (*Day*, Q.C., and *Benjamin*, Q.C., with him), for the plaintiff: The question whether there was negligence on the part of the captain in not mentioning the loss of the anchor is one for the jury, and one upon which the plaintiff, from the course which the case took at the trial, was not called upon to give evidence. Secondly, there was no misdirection. It is laid down in *Elton v. Larkins* (') that, generally speaking, it is not necessary that the assured should

(1) 1 T. R., 12.

(2) Law Rep., 2 Q. B., 511.

(3) 1 M. & S., 35.

(4) 5 C. & P., 392; 8 Bing., 198.

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communicate the hour at which the vessel sailed, but if the time be such as to make the ship a missing ship, then it becomes material.

[BLACKBURN, J.: If the direction was that the letter could not be material unless the ship was missing, it was inaccurate.]

511] *The letter did not show the time of sailing, but only a delay in loading. [He referred to Arnould on Marine Insurance, 4th ed., vol. i, p. 513.]

BLACKBURN, J.: I think it is impossible to say that the verdict can be entered for the defendants upon the point now taken by them. This point is that, inasmuch as the captain of the *Jessie* did not in his letter to the plaintiff mention the fact that she had lost her anchor in the storm on the 1st of January, and consequently the plaintiff effected his insurance without disclosing this fact, the policy must be taken to be void; for it was a policy, lost or not lost, at and from Mazagan, so that the loss of the anchor was a loss within the policy, and the underwriters ought to have been informed of it. It is admitted that this point was not taken at the trial, but it is contended that the defendants, upon proof of this non-disclosure, are entitled to have the verdict entered in their favor. The cases relied upon are *Proudford v. Montefiore* ⁽¹⁾ and *Fitzherbert v. Mather* ⁽²⁾, and these cases undoubtedly show that if an agent purposely keeps back information from his principal in order that he may effect an insurance, the principal is responsible for the misrepresentation, and the policy is void. It is unnecessary to say whether these cases must be taken to have decided that where the agent does not act fraudulently, but is only guilty of negligence in not disclosing what he knows, that this will also avoid the policy. But there is also the case of *Gladstone v. King* ⁽³⁾, where it was held that where the captain, without fraud, neglects to communicate to the owner damage done to the vessel, that this damage is an implied exception out of the policy.

Taking these cases together, it certainly cannot be assumed that any concealment from the owner by the captain of a damage to the vessel, which might be claimed for as an average loss, would avoid the policy. I must confess that I much prefer the doctrine in *Phillips on Insurance*, § 564, that in order to avoid the policy, the misrepresentation or concealment by the master must be fraudulent. We certainly cannot enter the verdict for the defendants, as, if the point had been taken at the trial, several questions would

⁽¹⁾ Law Rep., 2 Q. B., 511.

⁽²⁾ 1 T. R., 12.

⁽³⁾ 1 M. & S., 35.

*have arisen as to the extent to which the accident [512 was a fact material to be communicated, and as to how far the master was guilty of negligence in not communicating it. Upon another trial, the matter may, if necessary, be investigated.

We come now to the second question, whether there was misdirection, or whether the verdict was against the weight of evidence. I am inclined to think that the rule ought to be made absolute on both grounds. The plaintiff appears to have received a letter from the captain, dated the 9th of January, which reached him on the 24th. This letter was said to have been lost, but the plaintiff gave its contents from memory, and according to him the captain said that he had a fine passage out, that he had commenced loading, but that he had very bad weather, and did not know when he should finish, but that he would write again. Then the plaintiff, on the 24th of February, a month after the receipt of the letter, insures his ship without mentioning the letter.

The question was, whether this letter, and the time which had elapsed since it was received, ought to have been communicated to the underwriter. I think the test is, whether a fair and reasonable underwriter, looking at this letter and the circumstances under which it was received, would say, "I think this is a speculative risk, which I will either decline to take, or, if I do take, it shall be at a greater premium than is usual."

Now, I rather think that what the learned judge left to the jury was simply the question whether the ship was what is called a "missing ship," so that there was a presumption that she was lost when the insurance was effected. I think this was not the real question. The real question was, whether the contents of the letter, the dates at which it was written and received, and the time which had elapsed since anything had been heard of the vessel, were not facts which might properly have influenced the underwriter in accepting the risk. If, however, the question was in fact, left to the jury, then I think that this verdict was so far unsatisfactory that there ought to be a new trial. In either view I think the rule for a new trial ought to be made absolute.

LUSH, J.: The first question raised in this case is one of great importance, and upon which there is no authority exactly in point. *It appears that during her stay at [513 Mazagan, the Jessie was driven from her anchorage by a tempest and lost an anchor, and that the master in writing to his owners made no mention of this fact. The ship got back into the roadstead, completed her loading, and started

upon her homeward voyage, and in the course of this voyage was lost. The question for our consideration is, are the underwriters liable, or are we bound to say that because the loss of the anchor was not communicated to them that therefore no claim can be made upon them? The latter proposition is so startling a one that I should be most unwilling to follow it unless I were bound by authority. It would no doubt be obviously unjust to make the underwriters liable for the loss of the anchor, for this was a loss which was not in the contemplation of either the owners or the underwriters, but it is a very different question whether they should not be liable for the subsequent loss of the ship. I quite agree with the authorities which establish that where the master of the ship, or the agent or correspondent of the owner, wilfully or by culpable negligence withholds any fact material to the risk, the owner, in making an insurance, is identified with his agent and liable for his default. But there is the further question, whether, in such a case, the policy is wholly void or only void *pro tanto*. In the two cases of *Fitzherbert v. Mather* (*) and *Proudfoot v. Montefiore* (†) the claim was for a total loss, and in each case the agent, in order that his principal might in the meantime effect an insurance, wilfully kept back information of the same loss in respect of which the claim was afterwards made. In neither case did the point now before us arise, but in the intermediate case of *Gladstone v. King* (‡) a similar point arose. In that case there was no fraud on the part of the agent, at any rate there was no finding of fraud, but he did not communicate to the owner the particulars of an accident which afterwards resulted in a partial loss of the vessel. The court held, in an action to recover the amount of this same partial loss, that the cause of the damage not having been communicated, the damage was impliedly excepted from the policy, but they did not hold the policy to be void, for they negatived the right of the assured to recover back his premium. Now, whether this case will hereafter be 514] maintained *or not I cannot say, but it may certainly, I think, be urged that such a claim was not in the contemplation of either party. In the present case no such observation can be made, for the loss of the anchor must have been replaced, and the loss which afterwards occurred was unconnected with the previous loss of the anchor, and was a loss which both parties intended to assure. If the present action had been simply to recover the loss of the anchor I should have been quite prepared to hold, following *Glad-*

(*) 1 T. R., 12.

(†) Law Rep., 2 Q. B., 511.

(‡) 1 M. & S., 35.

stone v. King ⁽¹⁾, that the loss was not recoverable under the policy. But I think that as the claim is not in respect of the anchor, but on a distinct and subsequent loss, the policy itself is not void, for there is no evidence of fraud or even of negligence in not mentioning the accident. I think, therefore, that the defendants cannot have the verdict entered in their favor on this point. Upon the other point, I agree with my Brother Blackburn that the letter was one which might easily have influenced the underwriter in considering whether he should accept the risk, and the question whether it would so have influenced a reasonable underwriter ought to have been left to the jury. It does not seem to me that the question was placed clearly before them, and I think that the case ought to go down for a new trial.

QUAIN, J.: I am of the same opinion. With regard to the first point, all that we need say is, that it was not taken at the trial. If it had been, it might have been necessary to ask the jury questions as to how far the communication was material, and how far it was the duty of the plaintiff to inform the defendants of it.

With regard to the other point, there is some difficulty in ascertaining what was the exact direction which was given by the learned judge. But I do not find that the jury were asked to consider whether, under the circumstances, the non-disclosure of the letter was the concealment of a material fact likely to influence the mind of an ordinary underwriter in fixing the premium. The verdict seems to have proceeded on an erroneous ground altogether, namely, whether at the time of the insurance the *Jessie* was an overdue or missing ship. I do not think this can be considered as the test whether the communication was material or not; the question was, whether the letter was part of the circumstances *relating to the ship which ought to have [515] been submitted to the underwriter, that he might take it into account in accepting the insurance and in fixing the premium.

Motion refused, rule absolute for a new trial.

Solicitor for plaintiff: *McDiarmid*.

Solicitors for defendants: *Argles & Rawlins*.

(1) 1 M. & S., 35.

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Harris v. Great Western Railway Company.

[1 Queen's Bench Division, 515.]

May 30, 1876.

HARRIS v. THE GREAT WESTERN RAILWAY COMPANY.*Deposit for safe Custody—Railway Company—Conditions on Back of Cloak room Ticket—Condition exempting from Responsibility for Goods above a certain Value.*

The plaintiff having been a passenger by the defendants' railway, her luggage (consisting of two packages) was deposited with a clerk of the defendants, at their cloak room; and the person depositing it received a ticket which was headed "Luggage and cloak office," and on the face of which was printed, in type easily legible, "left, subject to the conditions on the other side. This ticket to be given up when the luggage is taken away." And on the other side, after a statement of the "sums to be paid for warehousing passengers' luggage," there was a notice that "the company will not be responsible for loss of, or injury to, any package beyond the value of £5, unless at the time of the delivery of such package the true value and nature thereof . . . shall have been declared, . . . and a sum at the rate of 1d. per pound sterling . . . be paid . . . in addition to the before-mentioned ordinary warehouse charges. The company will not be responsible for loss of, or injury to, articles except left in the cloak room." The value of each package was more than £5, but no declaration of value or additional payment was made. The person who deposited the luggage knew that there were conditions on the back of the ticket, but did not know what those conditions were. The luggage was not put by the defendants' servants into the cloak room, but was left in a vestibule, without any other protection, and was stolen owing to this negligence of the defendants' servants. On these facts, the court having power to draw inferences:

Held, that the luggage must be taken to have been deposited subject to the conditions on the back of the ticket.

Held, also, by Blackburn and Mellor, JJ., that the conditions were applicable to the loss, and protected the defendants, although the luggage was not deposited in the cloak room.

But by Lush, J., that the contract was to warehouse the luggage in the cloak room, and that the conditions only protected the defendants as to a deposit in the cloak room.

Henderson v. Stevenson (Law Rep., 2 H. L., Sc., 470) distinguished.

ACTION to recover the value of passenger's luggage delivered to the defendants at their cloak room.

516] *At the trial before Pollock, B., without a jury, a verdict was found for the plaintiff for £60, with leave to move to enter judgment for the defendants, the court to have power to draw inferences of fact.

The facts are fully stated in the judgment of Blackburn, J.

April 26. *Thesiger*, Q.C., and *Digby*, for the defendants: The conditions on the back of the ticket were part of the contract: *Henderson v. Stevenson* (¹); *Van Toll v. South Eastern Ry. Co.* (²); *York, Newcastle and Berwick Ry. Co. v. Crisp* (³); *Stewart v. London and North Western Ry. Co.* (⁴); *Zunz v. South Eastern Ry. Co.* (⁵); *John-*

(¹) Law Rep., 2 H. L., Sc., 470.

(²) 12 C. B. (N.S.), 75; 81 L. J. (C.P.), 241.

(³) 14 C. B., 527; 23 L. J. (C.P.), 125.

(⁴) 3 H. & C., 135; 33 L. J. (Ex.), 199.

(⁵) Law Rep., 4 Q. B., 539.

son v. Great Southern and Western Ry. Co. ('); *Lewis v. McKee* ('). Those cases show that express assent to the conditions was not necessary, and that the reference on the face of the contract, with the facts in evidence in this case, was sufficient to make the conditions part of the contract. The conditions, being part of the contract, protect the defendants from this loss: *Van Toll v. South Eastern Ry. Co.* (').

Sir *H. James*, Q.C., and *Masterman*, for the plaintiff: The conditions on the back of the ticket were not part of the contract. *Henderson v. Stevenson* (') is a direct authority on this point. But even if they were, they do not protect the defendants; in the first place, because the contract was that the luggage should be put into the cloak room, and it never was put there; in the second place, because the conditions cannot exempt the defendants from responsibility for gross negligence: *Birkett v. Willan* ('); *Hodges on Railways*, 5th ed., p. 456, citing *Wyld v. Pickford* (').

[BLACKBURN, J.: *Hinton v. Dibbin* (') is against that contention.]

Hinton v. Dibbin (') was a decision upon 11 Geo. 4 & 1 Wm. 4, c. 68, and does not diminish the weight of *Wyld v. Pickford* (') as an authority upon conditions apart from statute.

[BLACKBURN, J.: In *Hinton v. Dibbin* (') the effect of conditions apart from the statute was also considered.]

**Gill v. Manchester Ry. Co.* ('), and *D'Arc v. London and North Western Ry. Co.* ('), the latter following *Robinson v. Great Western Ry. Co.* ('), show that the defendants are responsible, notwithstanding the conditions.

Digby was heard in reply, and referred to *Gallin v. London and North Western Ry. Co.* (') and *Peek v. North Staffordshire Ry. Co.* (').

Cur. adv. vult.

May 30. The following judgments were delivered:

LUSH, J.: I agree with my learned brothers in holding, and for the same reasons, that the goods in question were delivered to and were accepted by the company, upon the terms and conditions mentioned in the ticket, and that the contract of the company was therefore qualified by those

(1) Ir. Rep., 9 C. L., 108.

(2) Law Rep., 4 Ex., 58.

(3) 12 C. B. (N.S.), 75; 31 L. J. (C.P.),

241.

(4) Law Rep., 2 H. L., Sc., 470.

(5) 2 B. & Ald., 356.

(6) 8 M. & W., 443.

(7) 2 Q. B., 646.

(8) Law Rep., 8 Q. B., 186.

(9) Law Rep., 9 C. P., 325.

(10) 35 L. J. (C.P.), 123.

(11) Law Rep., 10 Q. B., 212.

(12) 10 H. L. C., 473; 32 L. J. (Q.B.), 241.

conditions. But upon the second question, viz., whether, under the circumstances disclosed in the case, the company can avail themselves of the protection intended by the first condition, I have arrived at a different conclusion.

I think the condition is not applicable to the kind of custody in which these packages were kept. Of course, if a package intrusted to a warehouseman is restored to the owner in the same condition as it was when he delivered it, it matters not to him where and how it has been kept. The warehouseman in that case will have fulfilled his contract, and no cause of complaint arises though he may not have kept it in the place where he contracted to keep it. It is only when the package has been lost or damaged that it becomes material to inquire where it was deposited and how the loss or damage was occasioned, in order to ascertain whether it was attributable to any negligence of the warehouseman, for he is not an insurer, and is only responsible for loss or damage happening through his default. His contract is, to take due and reasonable care of the goods intrusted to him, which includes the keeping them in a suitable place where they will not be exposed to depredation, or to damage [518] by weather, breakage, or otherwise. If, notwithstanding such due and reasonable care the goods are stolen, burnt, or damaged, he is not responsible; but if these casualties happen through his negligence he is.

The parcels in question being of comparatively small dimensions and weight, and therefore easily removable, ought to have been kept out of the way of thieves. If either had happened to be of less value than £5, and not so within the first condition, there would, I apprehend, have been no doubt in the mind of any one that the company would have been liable to make good the loss; and the ground of their liability would have been the not keeping it in a reasonably safe place of deposit. They would have been told that if they chose to keep such goods unguarded in a place of public resort, they did so at their own risk and not at the risk of the owner. If they had kept them in the cloak room, and they had been stolen from thence by reason of the door being carelessly left open, or if they had been damaged by any carelessness of their servants, in that case also, the company would have been liable, but if, without any fault on the part of their servants, they had been stolen, burnt, or injured, the loss would have fallen on the owner.

The condition must, in my opinion, be read as intended to protect the company in cases where they would other-

wise have been responsible by reason of the negligence of their servants in the keeping and management of the warehouse, and not to relieve them from the duty of warehousing at all. What the owner pays for is such an amount of security as a reasonably safe warehouse affords, and not the mere permission to leave the goods on the company's premises. In other words, the owner who does not insure takes upon himself a warehouse risk, the risk of his goods being stolen, burnt, or damaged, while there. The argument on the part of the company casts on him a risk which no one contemplates when he pays for warehousing, and which would excuse the company not merely for want of care in the keeping, but for actual exposure of the goods in the open air, not only to every passing thief, but to damage by rain, or breakage, or otherwise, if this was done by their servants in neglect of their duty—in fact they would be irresponsible though no precaution whatever were taken to secure the safety of the goods.

I cannot think that is the true meaning of the [519 condition, because it would be utterly inconsistent with the relation of bailee for reward and bailor, and, in my view, equally inconsistent with the terms of the ticket itself.

The ticket is headed, "Luggage and cloak office." This, it is true, may merely be meant to indicate the place where it is issued. But it goes on to state that the sum charged is for "warehousing." It notifies that the company will not be responsible, under any circumstances, for loss of, or injury to, articles, "except left in the cloak room," that they will not deliver up luggage except to persons producing the ticket; and, lastly, that "the cloak room is only open on Sundays at such times as the trains arrive at, and depart from, the station." What is this but a plain intimation that the goods are to be deposited in the cloak room? Why, otherwise, should the depositor be informed at what hours the cloak room is open on Sunday?

The inference is to my mind irresistible that the company, by the very terms of the ticket, engage to keep the goods in the cloak room; and, that being so, the condition in question must be read as applying to a cloak room custody, and as if the words had been that the company will not be responsible if they are stolen from the cloak room, or burnt, or delivered to the wrong person, or damaged while there, although this may have been caused by the negligence of their servants. As the goods were never in the cloak room, they were not subject to the condition. It seems needless

to say that the loss is directly attributable to this breach of contract, for, if the articles had been in the cloak room, the thief could not have got at them so as to pass them off as his own luggage.

The case closely resembles, I think, *Lyon v. Mells* ⁽¹⁾. There a lighterman, who had given notice that he would not be answerable for any loss or damage to any cargo put on board his lighter, unless such loss or damage should be occasioned by want of ordinary care and diligence in the master or crew, and then only to the extent of 10 per cent. upon the loss or damage, was held not entitled to any protection where the damage was caused by the unseaworthiness of the lighter, a breach of the condition implied by law. The notice was construed as applicable solely to goods carried in a seaworthy vessel.

For these reasons I am of opinion that our judgment ought to be for the plaintiff.

MELLOR, J.: In this case the facts and evidence, so far as they appeared on the trial before Pollock, B., without a jury, are sufficiently set out in the judgment about to be delivered by my Brother Blackburn, and I think it unnecessary to state them.

On the argument, two questions were made; first, whether the plaintiff, under the circumstances, was bound by the terms of the ticket, which was delivered to her agent on his depositing the portmanteau and box in the custody of the defendants' servants in the vestibule to the cloak and luggage room; secondly, whether, on the true construction of the terms of the ticket, the company were relieved from liability by the fact, that on the deposit of the portmanteau and box no declaration was made of the true value and nature of the articles or property therein, as required by the second condition, each article being above the value of £5.

The ticket in question was as follows:

⁽¹⁾ 5 East, 428.

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"G. 56

Great Western Railway.

"No. 999

Paddington Station.

"(259)

Luggage and Cloak office.

"Friday the 29th of May, 1874.

Articles.	Amount.	
	s.	d.
1 Portmanteau		2
1 Box		2
Insurance on £ _____ @ 1d. per £		
Additional charge for _____ days @ 1d. }		
each article per day		
Total		

"Left in the name of _____
and subject to the conditions on the other side.

"J. L., Clerk.

"This ticket to be given up when the luggage is taken away."

*"Conditions. [On the back of the ticket.] [521

"N.B.—The Great Western Railway Company appoint that the undermentioned sums be paid them for warehousing passengers' luggage, which has been, or which is about to be, conveyed on their railways, viz.:

"For any period not exceeding three days, twopence for each package; and after three days, one penny additional for each package per day, or part of a day.

"And they hereby give notice that they will not be answerable for loss of, or injury to, any such package beyond the value of five pounds, unless at the time of the delivery of such package to them the true value and nature thereof, and of the article or articles, or property therein, shall have been declared by the person delivering the same, and a sum at the rate of one penny per pound sterling of the declared value be paid for such package for each day, or part of a day, for which the same shall be left, in addition to the before-mentioned ordinary warehouse charges.

"Every person depositing luggage will be furnished with a receipt, stating the number and description of the articles deposited, which receipt must be given up to the companies' servants upon their delivery of the articles thereon described; and the companies give notice that they will not deliver up

luggage, except to persons producing the proper receipt for the respective articles claimed, which delivery shall acquit the companies from all further claims in respect thereof.

"The company will not be responsible, under any circumstances, for loss of, or injury to, articles, except left in the cloak room.

"The company's servants are prohibited, under pain of instant dismissal, from receiving fees or gratuities, under any pretence whatever.

"On Sundays the cloak room is only open at such times as the trains arrive and depart from their stations."

The counsel for the plaintiff very much relied on the authority of the case of *Henderson v. Stevenson* (') in the House of Lords, and contended that the principle to be deduced from that case governed the present, and unless the present case can be distinguished, we are undoubtedly bound to follow that decision.

522] *I do not intend to say that we are bound by all the *dicta* which fell from the learned Lords who delivered judgment *seriatim* in that case, but we are bound by the *ratio decidendi* to be collected from those separate judgments. In that case the Lords were judges both of law and of fact, but, by the effect of the reservations in this case we are in the same position, and acting in the capacity of judges we declare the law, and of jurymen we draw inferences from the facts. In the report of the case of *Henderson v. Stevenson* ('), the head-note, with substantial accuracy, represents the facts as follows: "A ticket having on its face only the words 'Dublin and Whitehaven' was given to a passenger, who, without looking at it, paid for it and went on board. Having lost all his luggage, he brought an action against the company for its loss. Defence of the company, that on the back of the ticket there was an intimation that they were not to be liable for losses of any kind or from any cause." In carefully considering the judgments in that case, we find the Lord Chancellor thus expressing himself: "There was nothing upon the face of the ticket referring him to the back, and there was nothing said by the clerk who issued the ticket directing the respondent's attention to what was printed on the back." And further on he says: "The present is a case in which there was no reference whatever upon the ticket to anything other than that which was written upon the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self-contained

(') Law Rep., 2 H. L., Sc., 470.

without reference to anything *dehors*." And, referring to the case of *Stewart v. North Western Ry. Co.* (¹), he declined to express any opinion upon it beyond saying it did not govern the case then under consideration.

It is true that Lord Chelmsford intimated an opinion to the effect that "The moment the money for the passage is paid and accepted their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage-money, the ticket being only a voucher that the money has been paid."

Lord Hatherley's opinion seems to be in accord with Lord Chelmsford's as to the effect of the ticket being merely in the nature of a voucher that the passage-money has been paid.

*Lord O'Hagan's opinion is certainly more in [523 conformity with the reasons assigned by the Lord Chancellor, and he said "that the receipt of a ticket under such circumstances, and with such an indorsement as we have before us, is not shown by the authorities cited at the bar to furnish, *per se*, sufficient evidence of such assent or knowledge."

Doubtless some of the observations which fell from Lord Chelmsford and Lord Hatherley may appear to have a bearing beyond the precise facts of that case, but I cannot help thinking that they were only intended to refer to the peculiar circumstances which there appeared, and the description of the ticket upon which the matter arose.

In the present case the journey of the plaintiff was complete and the responsibility of the company as carriers had ceased, but they had, for the convenience of the travelling public, established a luggage and cloak office, where passengers incumbered with luggage might, for their own convenience, deposit it on certain prescribed payments and on certain conditions both as to time of warehousing and redelivery. *Prima facie*, therefore, and as a matter of common sense, the person depositing the luggage would expect to do it on some special terms and conditions as to remuneration and care. Accordingly, on the luggage being brought to the luggage and cloak office to be deposited, and a payment of so much per article being demanded for the temporary accommodation required by the passenger, and the number of the articles being ascertained, an entry was made in the presence of the depositor on a printed ticket, which is not only a statement of the fees to be paid to the company, but is also a voucher for the redelivery of the articles deposited,

(¹) 3 H. & C., 135; 33 L. J. (Ex.), 199.

and a statement of the conditions upon which alone the company will accept the deposit.

A fac-simile of the ticket, and of all the matters contained on it, are set out above, and it appears that, in order to render the ticket of a convenient size, the paper referred to was printed on both sides, the first side specifying the articles as kept in the name of _____, and "subject to the conditions on the other side," followed by the initials of the clerk, and then, underneath, are printed the words, "this ticket to be given up when the luggage is taken away," and, 524] on the other side, in conformity with the *notice to that effect contained on the first side, are stated the conditions, and a notification of the times at which the cloak room is open for receipt and delivery of packages.

The ticket in this case much resembles a half-sheet of paper, upon which the writer, having filled up one side, turns over the page and continues the matter on the other.

The depositor in the present case not only was aware that the paper ticket so filled up and handed to him, in exchange for the portmanteau and box, contained something relating to the deposit, but believed that it contained conditions. Drawing inferences from his evidence, I come to the conclusion that he knew that the ticket contained terms and conditions in which the deposit was made, although he did not choose to read them so as to become aware of the exact contents. Under such circumstances, it would indeed be strange to hold that he was not bound by the terms and conditions of the ticket, which he accepted without objection. I come, therefore, to the conclusion that he cannot be permitted to excuse the plaintiff from the obligation of the terms of the ticket, on any pretext that he did not actually read them so as to become aware of the actual conditions.

I am further of opinion that the plaintiff was bound by the conduct of her agent, and is precluded, under the circumstances, from setting up any defence that she did not deposit the luggage on the terms which the ticket so handed to her agent contained, or assent thereto.

On the second question I feel considerable hesitation. Assuming that the plaintiff assented, or is precluded from objecting that the deposit of the luggage was not made on the terms and conditions of the ticket in question, then arises the question whether or not, on the true construction of the terms and conditions of the ticket, the company undertake simply to warehouse the luggage for the convenience of the passengers, using the machinery of the luggage and cloak

office as the office and place of business in which the matters relating to the deposit must be made and the ticket business transacted, or did they undertake to warehouse the articles left in their charge in the actual luggage and cloak office, so as to give to the person making the deposit, and paying the prescribed sum, the additional security which the actual deposit within the *luggage and cloak [525] office would afford? And it is to be observed that, the luggage and cloak office being locked up, except during the arrival and departure of trains, when a servant or servants would be present, and would probably prevent the access of strangers or thieves to the articles deposited, it may be said that the depositor might be willing to pay for the accommodation offered, if accompanied by the additional security afforded by the cloak room, and yet not be willing to assent to the additions if the company were only to accept the responsibility of warehousing them generally.

Now, it is to be observed that the conditions on the face of them appear to apply in terms to "the warehousing passengers' luggage;" and, at the end of the condition upon which the defence upon this point rests, viz., the failure to declare the value and nature of the articles in question on the ground that they were beyond the value of £5, the sum, which by the condition was required to be paid on the value declared, is described to be "in addition to the before-mentioned *ordinary warehouse charges*."

It was, however, contended that in the fourth condition it is said, the company will not be responsible for the loss of, or injury to, articles "except left in the cloak room," and that those articles not being left in the "cloak room," the conditions do not apply to the case. I cannot, however, but think that the true effect of that condition with the others really is to notify that, unless the articles have gone through the process of being ascertained, counted, and the fees duly paid at the luggage and cloak office, the company will not be responsible at all.

I have come, therefore, to the conclusion that the limit of the company's undertaking was simply to warehouse the articles deposited on the conditions specified, and that they did not lose the benefit and protection of the conditions of the ticket, because the articles in question were not actually warehoused in the cloak room but were stolen from the vestibule.

I think, therefore, that the defendants are entitled to our judgment on both points.

1878^a

Harris v. Great Western Railway Co.

BLACKBURN, J.: The plaintiff was a passenger by defendants' railway, and arrived at the Paddington station in 526] London with a *portmanteau and a box, which she wished to leave in the custody of the defendants. Mr. Richard Harris, who acted for her, paid to the clerk of the defendants, at their cloak room, four pence, and received from him a ticket, on the terms of which much depends. He left the portmanteau and box in the custody of the defendants' servants; they put on them cloak room labels, and left them without any other protection in the vestibule. A plan was admitted on the trial, and produced before us on the argument, which showed the position of the cloak room and the vestibule. The vestibule is a place to which passengers have access, and in which luggage in the custody of passengers may be placed by them. A thief, taking advantage of this, either removed or concealed the cloak room tickets, treated the luggage as his own, and with an extreme of cool impudence, applied to the defendants' policeman on duty to assist in removing them, which the policeman did. The thief was subsequently convicted, but only part of the property was recovered. Each package of Miss Harris's luggage was above the value of £5, and her loss was £60, and for this the action was brought.

At the trial, before my Brother Pollock without a jury, the above facts were admitted, and neither then nor on the argument before us was it disputed that the loss was occasioned in consequence of the servants of the defendants having failed to exercise proper care in and about the safe keeping of the luggage thus left with them. The defence was rested on the ground that the plaintiff was bound by the terms of the ticket, which, it was said, prevented the plaintiff from recovering for any loss to a package above the value of £5 unless the value was declared and insurance paid at the rate of one penny per pound per day.

Mr. Richard Harris was called as a witness, and his evidence, as taken down on the judge's notes, was as follows: "When I left the box and portmanteau my attention was not called to the conditions on the ticket, nor was I aware of them." Cross-examined: "I have been in the habit of travelling for many years, and during the last three years have left parcels at this cloak room perhaps once a month when I came to town on business. I believe I have always, on those occasions, received a ticket similar to this. I was 527] not aware of the conditions. I *have probably seen conditions on the cloak room tickets of other English railways. I believe I have seen printing on both sides of the

Great Western tickets without reading them. I knew that I must deliver up the ticket when I wanted the articles deposited. I have seen the words on the ticket, 'This ticket to be given up when the luggage is taken away.' " Question: "Were you not aware it contained some conditions with reference to the deposit of the luggage although you were not aware what they were?" Answer: "I believed that there were some conditions." Re-examined: "My attention was not called to any condition, and I never gave it a thought. When I say I have always received a ticket similar to this I mean similar in general appearance." It was then admitted that the tickets used by defendants have for several years been the same as the ticket produced.

The learned judge found for the plaintiff, £60, reserving leave to move to enter judgment for the defendants, the court to draw inferences of fact.

The ticket (or rather a fac-simile of it) was produced on the argument of the motion before us.

Two questions were discussed. First, whether the plaintiff was, under the circumstances, bound by the terms of the ticket. Second, whether, on the true construction of those terms, they protected the defendants from liability for the loss, arising as this did. If either question is decided in favor of the plaintiff, the verdict and judgment for her must stand. I have, however, come to the conclusion that both questions should be answered in favor of the defendants, who are therefore, in my opinion, entitled to judgment.

I will, first, give my reasons for thinking that the plaintiff was, under the circumstances, bound by the terms of the ticket.

The materials from which we are to draw inferences are, first, the evidence of Mr. Harris, which I accept as true, and do so the more readily because he describes himself as being in a state of imperfect information, which I think probably very common; and, secondly, the ticket which was produced before us. The appearance of the face of the ticket is material in deciding this first question. The conditions on the back only become material in deciding the second question. It was a paper about five and a half inches square, [528 bearing the ordinary appearance of having been taken out of a book in which a counterfoil was left. The printed part was in clear, fair-sized type, such as any one might easily read. My Brother Mellor has, in his judgment, sufficiently stated its contents.

On the law governing this case, we were referred to the

case of *Henderson v. Stevenson* (¹), decided by the House of Lords sitting in appeal on a Scotch case, but on a subject in respect to which the law of Scotland and the law of England are one and the same. The Lords were there, in consequence of the forms of Scotch law, judges of fact, and we, in this case are, in consequence of the manner in which the point is reserved, also judges of fact. I think that all inferior tribunals, and the Lords themselves on any subsequent occasion, are not only required to treat this decision with great respect as an authority, but are bound to follow it as a decision. If it is thought wrong, it must be altered by the Legislature. And I make no distinction between the decision on the principle of law, as applicable to this case, and the principle on which the Lords drew the inference from the facts. I think the same inference should be drawn from the same facts, or facts which are in substance the same. But I think this is only true so far as the decision, or rather the *ratio decidendi*, of the House goes; and that opinions expressed by one or more of the Lords in delivering their opinions, if not part of the decision, are to be treated with great respect as authorities, but are not binding either on the House itself on a future occasion or on any other court.

This, I think, was decided in *Mersey Docks v. Gibbs* (²). Lord Cottenham had, in *Duncan v. Findlater* (³), enunciated a doctrine which was in direct conflict with the opinion delivered by the judges in *Mersey Docks v. Gibbs* (⁴). The judges, after mentioning what Lord Cottenham's opinion was, say (⁵): "This is, no doubt, a very high authority, being said by the Lord Chancellor in the House of Lords, though in a Scotch case, but, not being the point decided by the House, it is not conclusively binding, and we think that, with great deference to his high authority, we must dissent from the position there laid down." Lord Cran-529] worth and *Lord Wensleydale did not think it necessary to enter into details, and merely expressed their concurrence in the opinion delivered by the judges, thus deciding in contradiction to what Lord Cottenham had laid down in *Duncan v. Findlater* (⁶), without expressly saying anything about it. But Lord Westbury (⁷) thought it desirable "to say a few words with reference to the difficulty felt by the learned judges in consequence of certain observations that fell from Lord Chancellor Cottenham, and which are reported in the case of *Duncan v. Findlater*" (⁸). He then

(¹) Law Rep., 2 H. L., Sc., 470.

(²) 11 H. L. C., 686.

(³) 6 Cl. & F., 694.

(⁴) 11 H. L. C., at p. 720.

(⁵) 11 H. L. C., at pp. 732-733.

proceeds to express dissent from Lord Cottenham, and finally adds: "My Lords, the learned judges observed, and with very great correctness, that it is not everything that falls from a noble and learned lord in advising the House which is to be considered as the opinion of the House."

I call attention to this matter particularly, because I not only think myself bound to obey the decision of the House in *Henderson v. Stevenson* (*), but I also think (if I rightly understand the judgment) that, though that decision goes a step further than any prior decision of which I am aware, it is a logical extension of a principle which had been previously recognized by the courts; and therefore I not only obey that decision, but acquiesce in it. But there are expressions used by the different Lords which seem to express opinions which were not, I think, part of the decision of the case then before them, and which are not, in my opinion, correct when applied to the case we have before us of a ticket given on the deposit of goods with a company who do not hold themselves forth as general receivers of goods to be kept for hire, but let it be known that though they do not and will not, as a general rule, receive or keep such goods, they will take them if the passenger brings them to a particular office, and there receives a ticket, on the production of which the goods will be given up to the person producing it.

On the deposit of goods with a bailee who receives reward, so as to bring the case within the fifth head of bailments, mentioned by Lord Holt in *Coggs v. Bernard* (*), the bailee (unless he is one *who has the responsibilities of a [530 public carrier or innkeeper) undertakes no further obligation than to take proper care that the goods are safely kept from loss or injury: the deposit and receipt by the bailee for reward proves, as a matter of law, that the bailee received them on the terms that he undertakes this, and is responsible for any loss or injury occasioned by any neglect of the duty which he has thus undertaken. But if the bailor and bailee agree that the goods shall be deposited on other terms than those implied by law, the duty of the bailee, and consequently his responsibility, is determined by the terms on which both parties have agreed. And it is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet, in general, he is bound to the other by

(*) *Law Rep.*, 2 H. L., Sc., 470.

(*) 2 *Ld. Raym.*, 909; 1 *Sm. L. C.*, 188, 7th ed.

those terms; and that, I apprehend, is on the ground that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him, and is consequently precluded from denying that he did make himself acquainted with those terms. But then the preclusion only exists when the case is brought within the rule so carefully and accurately laid down by Parke, B., in delivering the judgment of the Exchequer in *Freeman v. Cooke* (¹), that is, if he "means his representation to be acted upon, and it is acted upon accordingly: or if, whatever a man's real intentions may be, he so conduct himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true." And accordingly, in *Allan v. Mawson* (²), where the plaintiff had taken an instrument which on a cursory view appeared to be a draft on Sir John Perring and others, bankers, London, but with the word "at" in very small letters inclosed in the hook of the S of the Sir, so as to make it at least doubtful whether the instrument did not purport to be a promissory note, Gibbs, C.J., asked the jury whether the word "at" was so inserted for the purpose of deception, for if so, it was to be struck out, and the instrument was a bill of exchange in fact. A similar decision, mentioned by Lord Hardwicke, in 2 Atk., 32, had been come to by Lord Macclesfield in a case where a man gave a girl a promissory note for "£20 value received, which I promise never to pay," and the word "never" was rejected. Both of those cases seem to me to proceed on the ground that in neither case could the defendant, as a reasonable man, believe that the other party had read the words inserted for the purpose of deceit, or that the other party meant to represent to the defendant that he had done so.

The decision in *Henderson v. Stevenson* (³) seems to me to proceed on the same principle, but to carry it one step further. There was no fraud or intentional deception found in that case, as there had been in the two just cited, but there was nothing to show that the steamboat company, who were the defendants in that case, or those who represented them, as reasonable men, would believe, from the conduct of the passenger, that he had represented to them

(¹) 2 Ex., at p. 663; 18 L. J. (Ex.), at p. 119.

(²) 4 Camp., 115.

(³) Law Rep., 2 H. L., Sc., 470.

that he had read or looked at the back of the ticket, and in point of fact he had not.

Lord Cairns, L.C., says: "On the face of this ticket there are letters indicating the name of the steamboat company and the words 'Dublin to Whitehaven.' This clearly, if the matter had so rested, would have been evidence of a contract on the part of the steam packet company to carry the person to whom the ticket was handed, in consideration of the money which he had paid to them, from Dublin to Whitehaven, and to use all reasonable care in the course of their undertaking so to carry him." He then points out that there was no reference on the face of the ticket to that which was printed on the back, and that the evidence was that the passenger had not, in fact, read what was on the back of the ticket, and proceeds: "The present is a case in which there was no reference whatever upon the face of the ticket to anything other than that which was written upon the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self-contained, without anything *dehors*. Those who were satisfied to hand to the passenger such a contract, complete upon the face of it, and to receive his money upon its being so handed to him, must be taken, as it seems to *me, to have made that con- [532 tract, and that contract only, with the passenger; and the passenger, on his receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shown to him." It certainly seems to me that this is, in other words, to say that, though the ticket was the contract, the passenger receiving such a ticket had not so conducted himself as to justify the steam packet company, or their servants, as reasonable men, in thinking that he had read, or ought to have read, or otherwise made himself acquainted with, what was on the back of the ticket, and consequently that the passenger was not precluded from showing that, in fact, he knew nothing of what was on the back. But, in the present case, the ticket has on the face of it a plain and unequivocal reference to the conditions printed on the back of it, and any person who reads that reference could, without difficulty, look at the back and see what these conditions were; and, that being so, the question comes to be, whether the plaintiff is not precluded from setting up that Mr. Harris, who acted for her in taking that ticket, never looked at the face of the ticket or bestowed a thought on what the conditions were; in other

words, whether, by depositing the goods and taking this ticket, he did not so act as to assert to the defendants that he had looked at and read the ticket and ascertained its terms, or was content to be bound by them without ascertaining them, and so induced them to enter into the contract with him in the belief that he had assented to its terms. I think he has so acted. It is true that Lord Chelmsford and Lord Hatherley, in *Henderson v. Stevenson* (¹), are reported to have thrown out an opinion that the contract was complete on the payment of the passage-money, and that ticket was but a receipt for that money. This certainly is no part of the decision of the House, and, indeed, seems to be contrary to the view taken by the Lord Chancellor. I will not inquire at present how far what was suggested by those noble lords may or may not be just when applied to a passenger going by a public conveyance, which was the case before the House, but is not the case before us, and on which, therefore, we are not required to express an opinion; but, with every respect for their authority, I 533] *cannot think it applicable to the case of a person depositing goods with a company who were in no way bound to receive them, and contemporaneously receiving a ticket which he knew was to be given up when the goods were demanded back. I think it would be as reasonable to allow the holder of a bill of lading, or of a wharfinger's receipt, or a dock warrant, to say that he thought this was only a receipt for the goods, and not a contract as to their carriage or custody. This, I think, cannot be allowed. I will not now inquire whether the question, whether the contract has been reduced into writing, is one of those preliminary questions which, according to *Bartlett v. Smith* (²), are to be decided by the judge, or one of those to be decided by the jury. I did express an opinion in *Peck v. North Staffordshire Ry. Co.* (³) that it was for the judge. As we are both judges and jurors in this case, it is not necessary to inquire in which capacity we decide the question.

The defendants, as a railway company, are not bound to receive goods at all for custody; they give notice that they will not receive them by any of their servants in general, but any one wishing to deposit goods with them must go to a particular office, there pay the proper remuneration, and receive a ticket. No man can come to that office without knowing so much. Few can come without knowing that the ticket is to be kept and produced when the goods

(¹) Law Rep., 2 H. L., Sc., 470.

(²) 10 H. L. C., 473, at pp. 517-518;

(³) 11 M. & W., 483.

32 L. J. (Q.B.), 241, at p. 253.

are taken away, a term which would not be implied by law if the ticket were merely a receipt for the money, and Mr. Harris did in fact know this.

It is clear that the defendants meant that the ticket should be the contract; what more could be required to justify their servants, as reasonable men, in believing that the person bringing the goods and paying the money, as part of the same transaction, receiving and carrying away the ticket, meant to assent to the terms in the ticket and to induce them to receive the goods on those terms? I doubt much—inasmuch as the railway company did not authorize their servants to receive goods for deposit on any other terms, and as they had done nothing to lead the plaintiff to believe that they had given such authority to their servants so as to preclude them from asserting, as against her, that the authority *was so limited—whether the true rule [534 of law is not that the plaintiff must assent to the contract intended by the defendants to be authorized, or treat the case as one in which there was no contract at all, and consequently no liability for safe custody: see *Belfast and Ballymena Railway v. Keys* ('). I think, as at present advised, the proper direction to a jury in such a case as this would be that, if they believed these undisputed facts, they ought to find that the terms were binding on the plaintiff. This we need not decide, but where I am to act as both judge and juror I have no hesitation in so finding.

The second question which arises depends entirely on the true construction of the conditions.

If I could agree with my Brother Lush that the meaning of the contract is that the defendants are to place the luggage in some separate warehouse to which none but the defendants or their servants had access, so that the placing them in the vestibule was a breach of contract, I should be inclined to agree in thinking that the defendants are liable to make good the loss arising from that breach of contract, on the principle of *Davis v. Garrett* ('), that the plaintiff could not qualify his wrong; or, as I should prefer to enunciate the same principle, that the condition relieving them from liability for a loss applies to a loss occurring whilst they are carrying out the contract, not to one incurred when acting in violation of it. *Lyon v. Mells* (') seems to me to proceed upon the ground that the condition exempting the owners of the lighter from liability for any loss, unless such loss was occasioned by negligence in the master and crew of the vessel, could not be construed as exempting them from

(') 9 H. L. C., 556.

(2) 6 Bing., 716.

(3) 5 East, 428.

loss occasioned by their own default, and seems to me not applicable to such a case as the present. Such was the construction put on that decision by Coleridge and Erle, JJ., in *Chippendale v. Lancashire and Yorkshire Ry. Co.* (1), and, I think, by the Court of Exchequer in *McManus v. Lancashire and Yorkshire Ry. Co.* (2).

But in the present case I read the contract as being to 535] keep *safely, i.e., with reasonable and proper care in any way which to the defendants seemed best, and to deliver up the goods on the production of the ticket if brought at the proper office hours to the cloak room. I do not think that depositing the luggage in the vestibule would have been any breach of contract, if the defendants had taken reasonable precautions to protect the luggage whilst placed in the vestibule from danger, as, for instance, by leaving a competent person to stand sentry over them till it was convenient to remove them to a more secure place. They would, if these parcels were under the value of £5, be in my opinion liable, not because they placed them in the vestibule, but because they took no care of them when there. I read the contract as being to take reasonable care of the luggage, and to be responsible for any loss occasioned by that want of care, with, in effect, a proviso that, inasmuch as the remuneration is very small and the loss may be very great, the defendants shall not be responsible for loss if the goods exceed £5 in value, unless the value is declared and paid for. So construed, the condition protects the defendants in the present case.

This question is of much less importance than the first, as the conditions can easily be altered if the intention of the defendants is not expressed on them, but it would equally decide this particular case.

In my opinion the judgment ought to be for the defendants, and, as Mellor, J., agrees with me, the judgment of the court will be for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Masterman, Hughes, Masterman & Rew.*

Solicitor for defendants: *R. Nelson.*

(1) 21 L. J. (Q.B.), 22.

201; 4 H. & N., 327; 28 L. J. (Ex.),

(2) 2 H. & N., 702; 27 L. J. (Ex.), 353.

See 13 Eng. Rep., 152 note; 14 Eng. Rep., 618 note.

As to the effect of a special contract exempting a carrier from his common law liability.

Alabama: South, etc., v. Henlien, 53 Ala., 606.

Connecticut: Camp v. Hartford, etc., 43 Conn., 333.

Iowa: Talbot v. Merchants, etc.,

41 Iowa, 247; Brush v. S. A., etc., 43 Iowa, 554.

Ireland: Moore v. Midland, etc., Irish Law Rep., 9 Com. Law, 20; Johnson v. Great, etc., Irish Law Rep., 9 Com. Law, 108.

Missouri: Rice v. Kansas, etc., 63 Missouri Rep., 314.

New York: Woodruff v. Sherrard, 9 Hun, 322; Madan v. Sherrard, 43 N. Y. Superior Ct. Rep. 353.

Ohio: Union Express v. Graham, 26 Ohio St. Rep., 595; Gaines v. Union, etc., 28 id., 418.

United States: Bank, etc., v. Adams, etc., 93 U. S. Rep., 174.

[1 Queen's Bench Division, 536.]

July 4, 1876.

***SWIRE and Another v. REDMAN & HOLT. [536]**

Two Joint Debtors, Right of, as against Creditor with Notice, to be treated as Principal and Surety.

R. & H., being in partnership, were in the habit, through plaintiffs' firm, of consigning goods to B. & S., in China, for sale; the proceeds were remitted to the plaintiffs in London, against which the plaintiffs accepted bills drawn by R. & H., and which they discounted. If the remittances did not put the plaintiffs in funds when the bills became due, the defendants were bound to make up the deficiency. By long practice, though there was no actual agreement, if the goods were not sold at the maturity of the bills, plaintiffs accepted fresh bills, which the defendants negotiated and handed the proceeds to plaintiffs, who were thereby enabled to take up the first acceptances, and so to let defendants have the benefit of the advance for a further time without being under cash advance. In 1873 the partnership of R. & H. ceased by efflux of time, and it was agreed between them that H. should take over the whole stock, &c., of the old firm. Plaintiffs had notice of this. At the dissolution of the partnership there were acceptances of the plaintiffs running, and, they, after the notice, renewed the bills, according to the old practice, by accepting fresh drafts of H. alone. When the goods were sold, the remittances were not sufficient to meet the plaintiff's advances, and they brought an action against R. & H. to recover the balance.

R. raised as a defence, that he had, by the agreement between him and H., become only a surety for H., instead of a principal joint debtor; and that the plaintiffs, by giving H. time after notice of this, had discharged R.:

Held, that R. & H. could not change their position with regard to the plaintiffs without their assent, and so deprive them of the right they had to treat both R. & H. as principal debtors; that R. was therefore not discharged by the giving time to H. by means of the fresh acceptances.

Oakeley v. Pasheller (4 Cl. & F., 207; 10 Bli. (N.S.), 508) distinguished.

Semble, even if the giving fresh acceptances would have otherwise discharged R., that, as it was only a continuance of the old practice to which R. was a party, it would not have discharged him.

Oakford v. European Shipping Co. (1 H. & M., 182) accord.

CLAIM to recover the balance of advances made by the plaintiffs to the defendants, Redman & Holt (by means of the acceptance by the plaintiffs of drafts of the defendants), upon consignments of goods made by the defendants to China, the proceeds of the sale of which were to be forwarded to the plaintiffs.

The defendant Holt let judgment go by default.

The defendant Redman stated as a defence that the plaintiffs, on the dissolution of the partnership between Holt &

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537] Redman, *had accepted the liability of Holt instead of that of the two defendants.

At the trial before Bramwell, B., at the Easter sittings in London, at the close of the plaintiffs' case,

Benjamin, Q.C., opened facts which he said discharged Redman;¹ but the learned judge ruled that if the facts opened were proved, they would amount to no defence, and directed a verdict and judgment for the plaintiffs for £5,479 5s. 11d., the balance proved to be due to the plaintiffs.

The facts, nature of defence, and course of trial are sufficiently stated in the judgment of the court.

An order to show cause why there should not be a new trial was obtained, on the ground of misdirection of the learned judge in holding that, assuming all the facts alleged by the defendant to be proved to the satisfaction of the jury, the plaintiffs were nevertheless entitled to a verdict.

June 29, 30. *Cohen*, Q.C., and *G. Bruce*, showed cause.

Benjamin, Q.C., and *A. Wills*, Q.C., in support of the order.

In addition to the authorities noticed in the judgment, the following were cited for the plaintiffs: *Bailey v. Edwards* ('); *Davies v. Stainbank* ('); *Hollier v. Eyre* ('); *Newton v. Chorlton* ('); and *Lindley on Partnership*, vol. i, 3d ed., p. 452.

Cur. adv. vult.

July 4. COCKBURN, C.J.: I will proceed to read the judgment in this case prepared by my Brother Blackburn, in which I fully concur.

In this action, tried before Baron Bramwell, the defendant Holt made no defence; and the action was tried between the plaintiffs and Redman, who defended.

After the evidence for the plaintiffs had been completed, Mr. Benjamin stated the defendant Redman's case; but the learned judge ruled that, supposing that the facts opened should be proved, there was no case for the defendant to go 538] to the jury; and he *directed a verdict for the amount claimed, which was £5,479 5s. 11d.

The facts proved on the evidence for the plaintiffs, so far as it is necessary to state them, were that the defendants Redman & Holt had been in partnership as spinners and manufacturers at Haworth, and also as stuff merchants at Bradford. They were in the habit, through the plaintiffs' firm, of consigning goods to Messrs. Butterfield & Swire in China, for sale, the proceeds of which were to be remitted

(¹) 4 B. & S., 761; 34 L. J. (Q.B.), 41.

(²) 6 De G. M. & G., 679.

(³) 9 Cl. & F., 1, 45.

(⁴) 2 Drew., 333, 338-339.

by Butterfield & Swire to the plaintiffs' firm in London. By an agreement in writing, dated the 29th of December, 1868, between the plaintiffs' firm and the defendants, these remittances were to be held specially to meet the liability the plaintiffs might have incurred by advances to the defendants effected by accepting their drafts, and any balance was to be paid to the defendants.

The mode in which the advances were made was, that the defendants drew on the plaintiffs drafts proportioned to the invoice value of the goods consigned. These drafts the plaintiffs accepted, and the defendants discounted their acceptances. When the acceptances became due, if the remittances did not put the plaintiffs in funds to meet the acceptances, the defendants were bound to pay the plaintiffs the deficiency.

There seems to have been no express agreement at any time as to what was to be done in case the goods were not sold before the maturity of the acceptances; but, in practice, the plaintiffs, in such cases, accepted a fresh draft, which the defendants negotiated, and thereby obtained funds which they handed to the plaintiffs, who were thereby enabled to take up the first acceptances, and so to let the defendants have the benefit of the advance for a further time, without being under cash advance.

There could be no doubt that this was so constantly done that Redman & Holt would have felt aggrieved if the plaintiffs had suddenly refused to prolong the advances in this way, and would have had a right in such case to say that the plaintiffs were treating them harshly. Whether the plaintiffs would by so doing have committed a breach of contract on which an action would have lain, is, to say the least, doubtful; and from the way in which the case was disposed of, without actually taking the opinion of the jury on any question, the defendant's counsel are probably *enti- [539] tled to argue that any points left doubtful must be taken to have been found in the way most favorable to him.

The course described was pursued for five years, till, on the 31st of December, 1873, the partnership between Redman & Holt expired by efflux of time, and of this the plaintiffs were then informed. At this date there were goods to a large amount consigned to Butterfield & Swire, and in their hands unsold, on the security of which the plaintiffs had, by accepting the drafts of Redman & Holt, made advance to the extent of many thousand pounds, for which the plaintiffs were liable, though they had been kept out of cash advance.

Holt, who had always managed the foreign trade, continued to manage the outstanding affairs of the late firm. He procured the renewal of the advances on many of the goods in the manner already described, by procuring the plaintiffs to accept fresh drafts, which he negotiated, and thereby obtained the funds necessary to keep the plaintiffs out of cash advance. These fresh drafts were drawn in the name of "Redman & Holt in liquidation." This continued till the 16th of November, 1874, up to which date the plaintiffs had no notice or knowledge that Redman & Holt were not equally interested in winding up the affairs of the late firm, and realizing the proceeds of their consignments. On that day Holt, by a letter of the 16th of November, 1874, informed the plaintiffs that it had been then finally arranged between him and Redman that he, Holt, should take over the whole of the stock of the old firm, and Holt suggested, for that reason, that future drafts should be signed in his own name, instead of that of Redman & Holt. This was acceded to, and several of the advances originally made to the old firm of Redman & Holt, on goods consigned by them, and then their property, though now Holt's property, were continued in the manner described, the drafts by the discount of which the plaintiffs were kept out of cash advance being drawn on the plaintiffs by Holt in his own name.

The date of the writ in this action was the 3d of December, 1875. Before that time the goods originally consigned by Redman & Holt had been sold and the proceeds received by the plaintiffs. These proceeds were not sufficient to re-
540] pay the advances made to *Redman & Holt; the deficiency was the amount for which the verdict was taken.

Part of this deficiency, £2,000 and upwards, arose in respect of advances on which there had been renewals prior to the 16th of November, 1874, by means of drafts of Redman & Holt in liquidation, but in respect of which there had been no renewals after the day on which the plaintiffs were affected with notice that the defendants Redman and Holt had agreed that Holt should take the stock of the old firm, and consequently that as between themselves Holt should be bound primarily to discharge the liabilities on that property, including the advances which the plaintiffs had made on their security to Redman & Holt jointly..

The remainder of the claim, £3,000 and upwards, was in respect of advances on goods not sold on the 16th of November, 1874, and on which the advances had been continued, the plaintiffs being kept out of cash advance by

means of acceptances of Holt's drafts, discounted in the manner described.

The question in the cause is, whether Redman is still liable for either of these sums.

It seems to us clear that the original advances were money lent to Redman & Holt for which they were debtors, and that the drawing of fresh drafts which were accepted, as described, was not in any way a satisfaction of that debt, but only machinery by which it was provided that the time for payment should be extended without the plaintiffs coming under any cash advance. Part of Baron Bramwell's ruling was that there was no evidence that there had been any taking by the plaintiffs of Holt's sole liability in accord and satisfaction of the liability of Redman & Holt. And this, when the rule was moved, was thought so clearly right that no rule was granted on that point.

But the effect of the transactions was to grant an extension of time. For during the interval between the taking up of one of the drafts and the maturing of the substituted draft by means of which it was taken up, the plaintiffs could not have sued. And one point made by Mr. Benjamin in his opening was that the effect of this giving of time, as he said, to Holt alone, was to discharge Redman.

*So far as regards the £2,000 odd, as to which there [541] had been no renewal after the 16th of November, 1874, this seems to us absolutely untenable. For we think it clear law that a creditor, who has two principal debtors, may bind himself to one of them (in any way short of an absolute release) to give him time, or even not to sue him, without in the least prejudicing his right of recourse against the other. By suing that other debtor a recovery from him entitles him to recover contribution from his co-debtor, and consequently the creditor may by his suit against the one debtor bring about such a state of things as renders him, the creditor, liable to an action by the co-debtor who has been forced to make contribution, when by the bargain between the creditor and himself he ought not to have been; but this forms no defence for the other debtor. The law says that the party injured shall have compensation in damages adequate to the injury he has received, but that this shall form no defence to the party who has received no injury at all. And if no damage at all has been received there is no compensation due to any one. And this, we cannot but think, is consistent with sound sense and clear justice. And therefore, so long as the plaintiffs had no notice that the relation between Redman & Holt had been

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changed from that of joint principal debtors to something else, the plaintiffs might bind themselves to Holt in any way they pleased to give him time without thereby affecting in any way their remedy against Redman the co-debtor; and this we apprehend is clear, not merely in justice and sense, but on all decisions both at law and equity.

But where the two who become liable for a debt are not joint principal debtors, but from the beginning one of them is a principal and the other a surety, the case is different. The relation of principal and surety gives to the surety certain rights. Amongst others the surety has a right at any time to apply to the creditor and pay him off, and then (on giving proper indemnity for costs) to sue the principal in the creditor's name. We are not aware of any instance in which a surety ever in practice exercised this right; certainly the cases in which a surety uses it must be very rare. Still the surety has this right. And if the creditor binds himself not to sue the principal debtor, for however short a time, he does interfere with the surety's 542] theoretical right to sue *in his name during such period. It has been settled by decisions that there is an equity to say that such an interference with the rights of the surety,—in the immense majority of cases not damaging him to the extent even of a shilling,—must operate to deprive the creditor of his right of recourse against the surety, though it may be for thousands of pounds. But though this seems, if it may be permitted to speak in such terms of the doctrine sanctioned by very great lawyers, consistent neither with justice nor common sense, it has been long so firmly established that it can only be altered by the Legislature. And as it depends on the supposed inequity of interfering with the rights which the surety has as between him and the principal debtor, it is not material that the knowledge on the part of the creditor that the surety was from the beginning such, and therefore had such rights, was not acquired till after the surety had become liable to the creditor: *Pooley v. Harradine* (*), *Greenough v. McClelland* (*), and *Oriental Financial Corporation v. Overend, Gurney & Co.* (*).

This rule, whether it was originally right or not, is no doubt well established. But when, as in the present case, the two debtors are both principals, there is no such right. Redman never could have paid off the plaintiffs and sued Holt in their name, for by the very act of paying off the

(*) 7 E. & B., 431; 26 L. J. (Q.B.), 156.

(*) Law Rep., 7 Ch. Ap., 142.

(*) 2 E. & E., 424; 30 L. J. (Q.B.), 15.

plaintiffs the cause of action in their name would be gone, and the right which Redman would have had to sue Holt for contribution would be in no way affected by any bargain which the plaintiffs had made with Holt alone to give him further time.

The contention is that the two, Redman and Holt, had a right, without the knowledge or consent of the plaintiffs, to create a new state of things, and then, by giving notice, to prevent the plaintiffs from doing what they lawfully might before—to create a right in themselves, which, if observed, must derogate from the plaintiffs' right, and then to say that is inequitable in the plaintiffs to act in derogation of this right so created. Surely the inequity begins earlier, and is in the defendants derogating from the plaintiffs' right without their consent.

*It was however, argued, that however much this. [543 might be contrary to principle, it was established by the decision of the House of Lords in *Oakeley v. Pasheller* (*).

We do not think that any such point either arose or was decided in that case.

The case is very imperfectly reported, and the judgment seems to have been very meagre. The case is abstracted in *Lindley on Partnership*, 3d ed., p. 463. The decision appears to us to have proceeded on the ground that, by an arrangement to which the creditor Sir Charles Oakeley was a party, Kynaston, who was Sir Charles's son-in-law, became a partner in the house which was indebted to Sir Charles, and then, by arrangement between the three parties, Kynaston became a principal debtor to Sir Charles, and the outgoing partners became sureties to Kynaston. There was ample consideration for Sir Charles Oakeley agreeing to this change, and whether the conclusion of fact that he did so agree was right or wrong, the case did not and could not decide that it could be done without his consent. That such was the ground of the decision of the Lords we think sufficiently appears from both reports, ill as they are reported. The facts clearly were that Kynaston made himself a new debtor to Sir Charles Oakeley; and, if he was so, the respondents could not be liable for his default except in consequence of some arrangement by which they became his sureties.

In the very meagre report of the judgment of the Master of the Rolls in *Bligh* (*), he bases his judgment on the fact that "Sir Charles Oakeley well knew, in 1817, that by the arrangement between the two partners, Reid and Kynaston, they had become the principal debtors," that is, to Sir

(*) 4 Cl. & F., 207; 10 Bl. (N.S.), 548.

(*) 10 Bl. (N.S.), at p. 578, n.

Charles, which Kynaston could not be without Sir Charles's assent, "and Sherard's estate surety only." And during the argument in the House of Lords, Lord Lyndhurst points out the difficulty in converting a joint debtor into a surety without the creditor's assent ⁽¹⁾. He seems to have relied on this objection until the fact that Kynaston became a new debtor was brought to his notice ⁽²⁾. And, finally, in the 544] *judgment he says, "an arrangement was made between Sir Charles Oakeley and Kynaston" ⁽³⁾. This would have been quite irrelevant unless Kynaston had become a new debtor, and the other parties, by agreement with Sir Charles, sureties for him.

It is impossible to suppose that if Lord Lyndhurst had been delivering a judgment of the House of Lords on a case of the first impression, and on which he knew (as appears from 10 Bligh (N.S.) at p. 586 ⁽⁴⁾) there was no previous decision, he would have done it in so perfunctory a manner as he appears to have done. It was not right in deciding on the special facts of the particular case to give so little information to the parties, but it would have been an incredible neglect of duty to say so little.

It is, however, true that in *Wilson v. Lloyd* ⁽⁵⁾, Bacon, V.C., in citing *Oakeley v. Pasheller* ⁽⁶⁾ takes no notice of the very important fact that the new partner was introduced as a new member of the firm, and as a fresh debtor to the creditor by an arrangement between the three.

No English case has actually decided this point if *Oakeley v. Pasheller* ⁽⁷⁾ does not. But there is an Irish case cited by Mr. Wills, which should be noticed. It is that of *Maingay v. Lewis* ⁽⁸⁾. There was a plea there on equitable grounds raising this very defence. The Irish Court of Queen's Bench, on demurrer, unanimously held the plea to be bad. But, on appeal before seven judges, four reversed this decision, three being for affirming it. But it is worth while to notice the reasons on which Lawson, J., based his judgment, which turned the scale. After stating the point he says: "To hold that this is so seems to me contrary to all sound principles of law. To affect the rights and alter the remedies, or even the order of the remedies, of a creditor, by an arrangement entered into between his debtors to which he was no party, seems to me to be an interference with contracts very contrary to the spirit of our law" ⁽⁹⁾.

⁽¹⁾ 10 Bl. (N.S.), at p. 586; see also 4 Cl. & F., at p. 232.

⁽²⁾ 10 Bl. (N.S.), at p. 587.

⁽³⁾ 10 Bl. (N.S.), at p. 589.

⁽⁴⁾ See also 4 Cl. & F., at p. 232.

⁽⁵⁾ Law Rep., 16 Eq., 60, 70.

⁽⁶⁾ 4 Cl. & F., 207; 10 Bl. (N.S.), 548.

⁽⁷⁾ Ir. Rep., 3 C. L., 495; in error, Ir. Rep., 5 C. L., 229.

⁽⁸⁾ Ir. Rep., 5 C. L., at p. 231.

So far we quite agree with him. But he adds, "I feel myself bound to come to the conclusion that the case is governed by the decision of the House of *Lords in [545 *Oakeley v. Pasheller* (1), and that I ought to follow it implicitly." Had Mr. Justice Lawson thought, as we do, that the decision in *Oakeley v. Pasheller* (1) proceeded on the ground that the creditor was a party to the arrangement, he would have decided in conformity with the opinion of the dissentient three in the Irish Court of Appeal.

We think, therefore, that the rule in this case should be discharged on this ground.

There is another point which it is not necessary for us to decide, but which it is as well to mention. Redman and Holt had, when in partnership, requested the plaintiffs to give time under the circumstances and in the way which they did after the dissolution to Holt alone. And, if the plaintiffs were not under a legal obligation to do so, there was a strong moral claim on them so to do. It seems strange justice to relieve Redman, because the plaintiffs in dealing with Holt after the dissolution in winding up a partnership debt pursued the very course which Redman had sanctioned and requested, if he had not stipulated for it; and *Oakford v. European Shipping Co.* (2) seems an authority for saying it is not equity.

Our judgment will be in favor of the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Flux & Co.*

Solicitor for defendant: *Field, Roscoe & Co.*, for Taylor & Co., Bradford.

(1) 4 Cl. & F., 207; 10 Bl. (N.S.), 548.

(2) 1 H. & M., 182.

It is now settled in England, in New York, and some of the other states, that *at law* parol evidence is admissible to show that one who appears on the face of a written contract to be a principal debtor is in fact only a surety. See 11 Eng. Rep., 41 note; 2 Monthly West. Jurist, 499.

Arkansas: See *Marshall v. Alvine*, 26 Ark., 513.

Canada, Upper: The earlier cases seem to be contrary to the rule recently settled in England and New York: *Nafis v. Serles*, 2 Com. Pl., 412; *Ball v. Gilson*, 7 C. P., 531; *Davidson v. Bartlett*, 1 Q. B., 50; *Elder v. Kelly*, 8 id., 240.

The later cases seem to conform to the English rule: *Darling v. McLean*, 20

Q. B., 373; *Bank v. Ackerman*, 15 C. P., 362; *Perley v. Loney*, 17 Q. B., 279.

England: *Bechevaaise v. Lewis*, L. R., 7 C. P., 872; 2 Eng. Rep., 684; *Liquidators v. Liquidators*, 11 Eng. Rep., 27.

Illinois: See *Paul v. Berry*, 78 Ills., 158.

Indiana: See *Nesbit v. Knowlton*, 51 Ind., 352.

Ireland: *Belfast, etc., v. Stanley*, Irish L. R., 1 C. L., 698.

Louisiana: See *O'Hara v. Schwab*, 26 La. Ann., 78.

Maryland: *Hale v. Pierce*, 32 Md., 327.

Mississippi: In chancery: *Davis v. Mikell*, *Freeman's Chy.*, 548.



Missouri: In this state the English and New York rule is not followed: *McMillan v. Parkell*, 64 Missouri, 286.

New York: *Hubbard v. Gurney*, 64 N. Y., 457; 13 Alb. Law Jour., 267, 2 Weekl. Dig., 335.

Pennsylvania: The contrary of the New York rule seems to be held in Pennsylvania: Fourth, etc., v. Frazier, 9 Phil. Rep., 213; *Bank v. Walker*, 12 Serg. & R., 382; 9 id., 229; *White v. Hopkins*, 3 W. & S., 99; *Lewis v. Hanchman*, 2 Penn. St., 416.

See *Miller v. Stern*, 2 Penn. St., 386.

Texas: In equity: *Yeary v. Smith*, 45 Tex., 71.

Vermont: *Harrington v. Wright*, 48 Verm., 427; *Bank v. Smith*, 30 Verm., 148.

A surety by the payment of a bond becomes the creditor and discharges his co-sureties by a valid extension to the principal of the time of payment: *Cameron v. Boulton*, 9 Upper Can. Com. Pl., 537.

A surety who, by arrangement between himself and the principal debtor, takes the primary liability upon himself, may, by subsequent arrangements with third parties, re-establish himself in the position and with the rights of a surety without the consent of the creditor: *Remsen v. Beekman*, 25 N. Y., 552.

When a mortgagee enters into an agreement with one to whom the property has been conveyed, subject to a mortgage, *without the grantee assuming the mortgage debt*, extending the time of payment thereof, he does not thereby release the mortgagor from his liability upon the bond executed at the time of the giving of the mortgage, for he remains the principal debtor: *Penfield v. Goodrich*, 10 Hun, 41.

So it has been held, for the same reason, where the grantee assumed the mortgage and agreed to pay it: *Meyer v. Lathrop*, 10 Hun, 66.

See 16 Alb. Law Jour., 374.

The contract of a surety is the measure and limit of his liability. Upon the death of one of the makers of a joint promissory note, who was not liable for the debt irrespective of the joint obligation, but who signed the note simply as surety, his estate is absolutely discharged both in law and in equity, and the survivors only are liable: *Getty v. Binsse*, 49 N. Y., 385;

Pickersgill v. Lahens, 15 Wallace, 140; *Wood v. Fish*, 63 N. Y., 245, reversing 4 Hun, 525.

See First, etc., v. Morgan, 6 Hun, 346.

In Upper Canada it has been held that the recovery of a judgment merges the original debt, so that the relation of principal and surety no longer exists as between the original surety and the creditor, and a subsequent extension to the original debtor will not discharge the original surety: *Duff v. Barrett*, 15 Grant's (U.C.) Chy., 632, 634, affirmed 17 id., 187; *Hamilton v. Holcombe*, 12 Upper Can. Com. Pl., 38.

The rule is clearly otherwise in the United States: *Lafarge v. Herter*, 9 N. Y., 241; 2 Monthly Western Jurist, 499, and numerous cases cited; *Davis v. Mikell*, Freeman's (Miss.) Chy., 548; *Anthony v. Capel*, 53 Miss., 350.

Though where the parties are only jointly liable, a judgment against one of the joint contractors would merge the right of action and prevent a recovery against the others, whether the party against whom judgment has not been taken is a surety or not: *Kerr v. Hereford*, 17 Upper C. Q. B., 158; *Harris v. Dunn*, 18 U. C. Q. B., 352; *Hollowell v. Marshall*, 8 Upper Can. C. Pl., 21; *Baby v. Municipal*, etc., 5 Grant's Chy., 232; *Olmstead v. Webster*, 8 N. Y., 418; *Matter of Higgins*, 3 De Gex & Jones, 33, and Mr. Perkins's note; *Nesbit v. Howe*, 8 Irish Law Rep., 273; *Crosby v. Jeroloman*, 37 Ind., 264; *Barnett v. Juday*, 38 Ind., 86; *Lingenfelter v. Simon*, 49 Ind., 82.

See 2 Monthly Western Jurist, 499; *Vestry v. Ramsey*, L. R., 6 C. P., 247; *Bank v. Cameron*, 17 Upper Can. Q. B., 237; New York Code (old), § 136, sub. 4.

A county treasurer having become a defaulter, actions were commenced against him and his sureties; the county authorities took from the treasurer a confession of judgment for £1,000, and a confession from one of his sureties for a like amount, being together equal to the defalcation then ascertained, and released the actions against them. The treasurer's second surety took no part in this arrangement. Afterwards a further defalcation was discovered, and thereupon the county authorities proceeded against the second surety of the treasurer and

obtained judgment against him for £1,000. Upon a bill filed to restrain that action the court granted a perpetual injunction for that purpose, although the county authorities and their attorney in the action at law swore that their rights as against the second surety were intended to have been reserved: *Baby v. Municipal, etc., 5 Grant's (U.C.) Chy., 282.*

Where the surety guarantees the collection of a claim the creditor must, without notice, proceed within a reasonable time. If he fail to do so, and the principal debtor becomes insolvent, the guarantor is discharged: *Craig v. Parkis, 40 N. Y., 181*, as explained in *Field v. Cutler, 4 Lans., 196.*

Except in case of a guaranty of collection, indulgence by a creditor to a principal debtor, for a valuable consideration, without the assent of a surety, discharges the latter: *Stewart v. Parker, 55 Geo., 656.*

When a creditor, by a valid and binding agreement with the principal debtor, without assent of the surety, materially varies the terms of the contract, or extends the time for its performance, the surety is thereby discharged: *Ducker v. Rapp, 4 Weekly Dig., 174*; *Dunham v. Countryman, 66 Barb., 268*; *Holland v. Johnson, 51 Ind., 346*; *Yeary v. Smith, 45 Texas, 56*; *Weed, etc., v. Oberreich, 38 Wisc., 325*; *Cameron v. Boulton, 9 Upper Can. Com. Pl., 537*; *Houer v. Mills, 10 id., 194*; *Matthewson v. Bronson, 1 Upper Can. Q. B., 272*; *Perley v. Loney, 17 id., 279*; *Kerr v. Cameron, 19 id., 366*; *Darling v. McLean, 20 id., 372*; *Fowler v. Perrin, 25 id., 227*; *Van Koughnet v. Mills, 5 Grant's (U.C.) Chy., 653*; *Mellish v. Green, Id., 655.*

In *Robinson v. Dale, 38 Wisc., 330*, a note was ante-dated so as to become due same time as by terms of the contract: held, not to discharge a surety.

The receiving of a payment of interest in advance upon a note, after its maturity, by the payee from the maker, implies a contract for the extension of the time of payment during the period for which interest is so paid, and if such extension be made without the consent of a surety he will be discharged: *Woodburn v. Carter, 50 Ind., 36.*

An agreement, founded on a good
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consideration, to stay proceedings in an action against a principal, like an agreement not to sue, will discharge a surety. A stipulation giving the principal time to answer in case of an action against him, is such an interference with and change of the contract that the law will imply injury to the surety and discharge him.

An extension of the time of payment of one instalment of rent will not impair the obligation of the surety as to others accruing subsequently: *Ducker v. Rapp, 4 N. Y. Weekl. Dig., 174, N. Y. Court Appeals.*

The release by the party to whom the first undertaking is given, or his assignee, of the sureties to that undertaking, *does not release* the sureties on a subsequent undertaking given to him. Payment in whole or in part by the sureties, to a prior undertaking, reduces the liability of the sureties on a subsequent one to the party to whom it is given by the amount of such payment. A release of the sureties, *to the undertaking given by the plaintiff on taking the property from the defendants*, upon a receipt from them of a portion of the amount for which they are bound under their undertaking, will not release the sureties to an undertaking given by the plaintiff, on appeal to the General Term from a judgment rendered against him in the action for the purpose of staying execution; but they are entitled to have credited on the amount for which they are bound the sum received from the sureties on the first undertaking: *Brennan v. Arnstein, 42 N. Y. Superior Court Rep., 375.*

In order to discharge a surety the creditor must, by a valid agreement, upon good consideration, have given time of payment to the principal debtor: *Cassidy v. Schedel, 9 Hun, 340*; *Thompson v. McDonald, 17 Upper Can. Q. B., 804*; *Thompson v. Marshall, 3 Western Law Monthly, 386*, distinguishing *Burr v. Butler, Wright, Ohio, 538*; *Yeary v. Smith, 45 Texas, 56*; *Robinson v. Dale, 38 Wisc., 330.*

A promissory note of a debtor given in renewal, or in place of one similar in form and by the same party, is not a discharge of the liability arising on the first note, although the latter is given up, and, after the first note becomes due, judgment is recovered on

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the second, and execution issued but returned unsatisfied: First, etc., *v. Morgan*, 6 Hun, 346.

See *Hubbard v. Gurney*, 64 N. Y., 457.

The creditor took the debtor's notes without the knowledge or consent of a surety, which he indorsed, and discounted at a bank, applying the proceeds upon the debt. Upon maturity of the notes he retired them and brought suit upon the original debt. Held, that the taking of the notes and what was done therewith prevented the creditor from proceeding against the debtor during the time the notes had to become payable, and that by giving the time to the principal, without the consent of the sureties, they were discharged: *Hooker v. Gamble*, 12 Upper Can. Com. Pl., 512; 13 id., 462.

An agreement by the holder of a promissory note with the maker to accept drafts or bills to the amount of said note, and to extend the payment during the time said drafts were running, carried out without the knowledge of the surety, will release such surety: *Pomeroy v. Tanner*, 5 Weekly Dig., 223, N. Y. Court Appeals.

An arbitration and award discharges sureties who do not consent thereto, although they were aware of it, did not object, and attended the arbitration: *Burke v. Glover*, 21 Upper Can. Q. B., 294.

It was not held that an usurious agreement to extend the time of payment of a debt is void and will not discharge a surety, as Mr. Brightly, in his Digest, vol. 1, 2231, No. 142, says of *Agand v. Ball*, 1 Alb. L. J., 181, N. Y. Court of Appeals.

That case went upon the ground that the suretyship was not known to the creditor: *Lesley v. Johnson*, 41 Barb., 359.

Such an agreement will discharge a surety: 11 Eng. Rep., 45 note; *Brown v. Prophit*, 53 Miss., 649.

So the payment of a greater than the legal rate of interest: *White v. Whitney*, 51 Ind., 124.

Though usurious: *Shaver v. Allison*, 11 Grant's (U.C.) Chy., 355; *Meyers v. Nat. Bank*, 78 Ills., 257.

A surety does not waive a discharge from extension by an unaccepted offer to pay in a particular way, nor by offer-

ing to pay without knowledge of the extension: *Kerr v. Cameron*, 19 Upper Can. Q. B., 366.

Mere indulgence to the debtor, however long, without any request by the surety to prosecute the principal, will not discharge the surety: *Summerhill v. Tapp*, 52 Ala., 227; *Lumsden v. Leonard*, 55 Geo., 374; *Clopton v. Spratt*, 52 Miss., 251; *Thompson v. McDonald*, 17 Upper Can. Q. B., 304.

The mere fact of a creditor abstaining from seizing under execution against the principal his interest in the stock in trade does not, of itself, furnish a ground for suspending execution against the surety, and that the surety claims that the creditor shall forbear his remedy against him until the exact value of such interest is ascertained: *Cunningham v. Buchanan*, 10 Grant's Chy., 523.

Mere discontinuance of an advertisement for the sale of real estate, under a deed of trust to secure a note, is not such a giving of time to the principal debtor as will discharge other makers of the notes who are sureties for him: *Butler v. Gambs*, 1 Mo. Appeal Rep., 466.

The mere failure to levy on property within the time fixed by law to authorize a sale will not discharge a surety: *Lumsden v. Leonard*, 55 Geo., 374; *Summerhill v. Tapp*, 52 Ala., 227; *Clopton v. Spratt*, 52 Miss., 251.

So a failure by the creditor to prove the claim in bankruptcy: *Clopton v. Spratt*, 52 Miss., 251.

The release of the administrator of the estate of the principal debtor from his liability on a bond as guardian, by the failure of his ward and his subsequent guardian to appear and prove the claim of the ward in a suit to settle the estate of the former guardian, operated as a release of the surety on his bond as guardian. Having failed to prove his claim in the suit to settle the estate of his guardian, the petition of the ward seeking to recover against the surety on his guardian's bond is ordered to be dismissed, on the ground that the release of the administrator of the guardian operated as a release of the surety of such guardian: *Stull v. Davidson*, 12 Bush (Ky.), 167.

A surety will not be released by rea-

son of the neglect of the sheriff to enforce the execution unless the creditor himself is responsible for the delay or omission: *Keeble v. Jones*, 1 Law and Equity Reporter, 306, Supreme Court, Tenn.

The mere withdrawal of executions against the property of the principal debtor from the hands of a sheriff is not sufficient to discharge a surety: *Ducker v. Rapp*, 4 N. Y. Weekl. Dig., 174, N. Y. Court Appeals.

Discharging a levy upon property of the debtor without the privity of the surety, discharges him: 2 Monthly Western Jurist, 503-4, and numerous cases cited; *Winston v. Yeargin*, 50 Ala., 340; *Woodward v. Walton*, 7 Heiskell (Tenn.), 50; *Davis v. Mikell*, *Freeman's (Miss.) Chy.*, 548.

See *Cunningham v. Buchanan*, 10 Grant's (U.C.) Chy., 523; *Robinson v. Brennan*, 11 Hun, 368.

Where the creditor receives payment of a judgment, he may give a satisfaction thereof notwithstanding other judgment debtors have property upon which such judgment, if not discharged, would have been a lien: *Booth v. Farmers, etc.*, 11 Hun, 258.

See *Robinson v. Brennan*, 11 Hun, 368.

Where the creditor neglected to record a mortgage given as security for the debt, so that the mortgaged property was lost as a security, held the surety was discharged: *Toomer v. Dickerson*, 37 Georgia, 428; *Bank v. Douglass*, 51 Geo., 206.

So where, after taking a mortgage, the creditor took a new one through claim that old one was no security: *Bank v. Douglass*, 51 Geo., 206.

Where a surety pleaded that when he signed the note it was agreed that the makers should transfer to the plaintiffs, as security for the payment of the note, by way of mortgage, a certain schooner, and that the plaintiffs agreed to hold the said vessel for the benefit and indemnity of the said defendant; that in pursuance of such agreement the vessel was assigned to the plaintiffs, and it thereby became the duty of the plaintiffs, when requested by the defendant, to sell the vessel, under a power of sale contained in the mortgage, for the benefit of the defendant; that the defendant

requested plaintiffs to sell said vessel; that the plaintiffs neglected and refused to comply with such request, and that the vessel was subsequently lost, whereby the defendant lost the benefit of the security of said vessel: Held, that if the plea intended to assert that whenever a creditor takes a mortgage from a principal debtor, with a power of sale, accompanied with the personal obligation of a surety, it becomes the imperative duty imposed upon the mortgage creditor, upon the request of the surety, at any time to sell the mortgaged property upon any default committed, at the peril, if he does not do so, of losing the benefit of the contract of suretyship, such proposition cannot be sustained in law; and that if the defendant intended to rely on an *express* agreement to this effect it was not proven: *Bank v. Davis*, 28 Upper Can. Com. Pl., 179.

It has been held that if the creditor hold collateral security, a surety is not released by mere inaction of the creditor relative thereto, in the absence of special circumstances making prompt action a duty; no mere laches short of such as will cause a bar of the statute of limitations, will release the surety on the original obligation: *Clopton v. Spratt*, 52 Miss., 251.

But see, to the contrary, *Wakeman v. Gowdy*, 10 Bosw., 208; *Smith v. Wilson*, Andrew's Rep., K. B., 187; *Buckingham v. Payne*, 36 Barb., 81; *Soule v. Union Bank*, 45 Barb., 111, 80 How. Prac., 105; *Hanna v. Holton*, 78 Penn. St. R., 384; *Haines v. Pearce*, 41 Md., 221; *Hall v. Moss*, 25 Upper Can. Q. B., 263.

While indulgence and mere passiveness by the creditor, with regard to collaterals placed in his hands by the principal debtor, will not release the surety, yet if, by any improper or unskillful dealing with such collateral, he impairs its value, or if he so treats it as to make it his own, the surety will be, *pro tanto*, released: *Clopton v. Spratt*, 52 Miss., 251.

In Missouri it has been held (*Davies Co. v. Sailor, etc.*, 68 Mo., 24), that in the absence of special authority the cashier of a bank has no power to discharge a surety on a note, and that hence his representation to a surety that he is no longer looked to, will not

bind the bank, nor will the bank be estopped from asserting its claim by reason of such assurance. Perhaps this may be good law, so far as a mere assurance is concerned, but we doubt its authority so far as it denies the authority of the cashier. A mere assurance that the surety is not looked to, probably would not be, of itself, a discharge.

Where a surety covenanted to pay certain advances made by the creditor of the principal to him on a certain day, or so soon as certain timber should be sold at Quebec, and before the time appointed arrived, and whilst the timber was being conveyed to Quebec, an agent of the creditors obtained from the principal debtor a confession of judgment, and sued out execution thereon, under which the timber in question was sold: Held, that this was such a dealing between the parties as discharged the surety from any further liability under the bond: *Dickson v. McPherson*, 3 Grant's (U. C.) Chy., 185.

An offer upon the part of the principal debtor to pay, and an omission so to do because of a request of the creditor that he retain the money, and the subsequent insolvency of the principal, do not discharge a surety. The act which will discharge a surety must be legally injurious or inconsistent with his legal rights; mere indulgence is not sufficient. An omission of duty on the part of a creditor, and a consequent injury, will not discharge the surety unless he has requested the performance of the duty: *Clark v. Sickler*, 64 N. Y., 231, distinguishing *Lewis v. Van Dusen* (25 Mich., 351) and *Joslyn v. Eastman* (46 Verm., 258).

The holder of a promissory note, believing it was paid off in a trade he supposed he had made with the principal, so informed the surety, who knew nothing to the contrary for five years, when suit was brought on it: Held, that this conduct of the holder discharged the surety: *Whitaker v. Kirby*, 54 Geo., 277; *Kingsley v. Vernon*, 4 Sandf. Supr. Court Rep., 361.

See *Hubbard v. Briggs*, 31 N. Y., 533.

The assignee of two judgments from different plaintiffs against the same defendant, on the older of which judgments there is a security, and on the younger there is none, must apply

money raised by the sheriff from defendant's property to the older judgment. If he apply it to the younger the surety is discharged *pro tanto*. It makes no difference in principle if the assignee, being purchaser of the property sold by the sheriff, does not actually pay the money to him, but it is considered paid, and is applied to the junior judgment. *Simmons v. Cotes*, 56 Geo., 609.

Merely taking additional security for a debt, though payable in the future, will not discharge a surety: *Cummings v. Bank*, 15 Grant's (U. C.) Chy., 686; *Bank v. McFaul*, 17 id., 294; *Ross v. Winans*, 5 Upper Can. Com. Pl., 185; *Kerr v. Hereford*, 17 Upper Can. Q. B., 158; *Shaw v. Crawford*, 16 U. C. Q. B., 101; *Newcomb v. Blakeley*, 1 Missouri Appeal Rep., 289.

So a stipulation not to sue the principal debtor: *Line v. Nelson*, 38 N. J. Law Rep., 358; *Ludweig v. Iglehart*, 43 Md., 39; *Bell v. Manning*, 11 Grant's (U. C.) Chy., 142; *De War v. Sparling*, 18 Grant's (U. C.) Chy., 633; *Wood v. Brett*, 9 Grant's Chy., 452.

See *Cumming v. Bank*, 15 Grant's (U. C.) Chy., 686.

Where one co-surety has been released from liability by the conduct of the creditor, the remaining co-surety is exonerated only as to so much of the original debt as the discharged surety could have been compelled to pay, had his obligation continued. A release of one joint debtor by parol will not operate to discharge the other, and can only be pleaded by the one to whom it was given.

Where there is a condition in a lease that the lessee shall not sublet the premises without the written consent of the lessor, the giving of such written consent will not discharge the sureties on the lease.

Where the rights of the creditor are reserved against the surety, notwithstanding a new agreement with the principal, and the surety is compelled to pay, he is entitled to be subrogated to the original rights of the creditor: *Morgan v. Smith*, 5 Weekl. Dig., 220, N. Y. Court App., 220, affirming 7 Hun, 244.

A composition by a debtor assented to by the surety will not discharge him: *Ludweig v. Iglehart*, 43 Md., 39.

A composition deed by which the holder of a note discharges the maker upon receiving a portion of the debt, does not discharge an indorser when the holder's remedy against him is expressly reserved by the deed: *Tobey v. Ellis*, 114 Mass., 120.

See *Line v. Nelson*, 38 N. J. Law R., 359; *Ludweig v. Iglehart*, 43 Md., 39.

The neglect of a creditor, when requested by a surety, to prosecute the principal debtor, discharges the surety, irrespective of knowledge or notice to the creditor of any facts suggesting the probability that delay could prove injurious to the surety: *Remsen v. Beekman*, 25 N. Y., 552; *Hurst v. Chambers*, 12 Bush (Ky.), 155; *Martin v. Skehan*, 2 Colorado, 614.

The rule applies though some of the principal debtors succeed on the plea of *non est factum*, if the others were solvent at the time of the notice and request: *Hurst v. Chambers*, 12 Bush (Ky.), 155.

It must appear that the principal debtor was solvent at the time of the request, *within the jurisdiction* of the state in which the suit against the surety may be instituted, and that the creditor, without any reasonable excuse, neglected or refused to proceed until the principal debtor became insolvent and unable to pay: *Warner v. Beardsley*, 8 Wend., 194; *Field v. Cutler*, 4 Laus., 195; *Kestner v. Spath*, 53 Ind., 288.

In such case it must be shown that the creditor was requested to enforce the collection of the debt *by due process of law*. Merely requesting the creditor to "push" the debtor, and to "keep pushing him," is not sufficient: *Singer v. Troutman*, 49 Barb., 182, 185.

In Michigan it is held a surety cannot notify the debtor that he must proceed and collect his claim of the principal debtor, but his remedy is to pay the debt and protect himself: *Inkster v. First Nat., etc.*, 30 Mich., 143.

Accommodation indorsers, after the note on which they were liable had matured, filed a bill against the holder and maker to enforce payment by the latter; the relief prayed was granted, and the maker was ordered to pay the costs both of the plaintiff and of the holder of the note: *Cunningham v. Lyster*, 18 Grant's (U. C.) Chy., 575.

The only equity which a surety has when his land is levied upon, is to force his creditor to exhaust the security that the principal debtor had made on his property, before a sale of property of the surety. The postponement of process upon a judgment against sureties, until after the property of the principal debtor had been exhausted and applied to the debt, is what a court of equity would do at the suit of a surety: *Wooten v. Buchanan*, 49 Miss., 386.

Especially if the security is taken under a tripartite agreement between the debtor, the creditor and the surety, that the lien shall be a security for whatever is due on the debtor's obligation: *Teeter v. St. John*, 10 Grant's (U. C.) Chy., 85.

But to make this principle applicable, the creditor must have known at the time of making the agreement for indulgence, that the defendant setting up such a discharge signed the instrument as surety: *Stewart v. Parker*, 55 Geo., 656.

In order to entitle one party to an instrument to set up a defence growing out of the fact that he was surety for another, the fact that he was such must be known to the creditor.

A note was signed by A. & Co., for the accommodation of B., who indorsed it to C. One of the firm of A. & Co. died. Held that though A. & Co. occupied the position of sureties to B., yet C. had a right to regard them as principals, and as to him, therefore, the liability continued on the note against the representatives of the deceased partner, and the case was not within the principle of *Getty v. Binsse* (49 N. Y. 885); *First, etc., v. Morgan*, 6 Hun, 346; *Inkster v. First National Bank*, 30 Mich., 143; *Agard v. Ball*, 1 Alb. Law Jour., 181, N.Y. Court Appeals. This case does not seem to have been elsewhere reported, though it is digested on another point in 1 *Brightly's N. Y. Digest*, 2231, No. 142.

See *Harrington v. Wright*, 48 Verm., 430-1.

In Canada it is held that the rights of the holder, as to whether or not one of the parties to an instrument is entitled to be treated as a surety, is fixed at the time of the negotiation of the instrument. Knowledge subsequently

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acquired is immaterial: *Bank v. Thomas*, 11 U. C. Com. Pl., 515.

Otherwise, if known at the time of the negotiation: *Bank v. Ockerman*, 15 Upper Can. Com. Pl., 368, 365; *Perley v. Loney*, 17 Upper Can. Q. B., 279.

In Ireland: see *Harris v. Sterling*, Irish Law Rep., 10 Com. Law, 230, reversing 9 id., 198.

A surety to the East India Company is discharged by payment of a balance to the principal under an erroneous settlement by the officers of the company without the knowledge or authority of the surety. When the principal has a sufficient fund in the hands of the obligee, and he thinks fit instead of retaining it in his hands to pay it back to the principal, a surety can never be called upon: *Law v. East India Company*, 4 Ves. Jr., 824, 829.

A person who was indebted as principal, upon a promissory note, to a banking firm, after the maturity thereof deposited in the bank of said firm, where said note was payable, and checked out sums amounting to more than said indebtedness, under a special agreement between the depositor and the bank that the former should buy cattle and give the sellers checks payable or to be presented after the buyer had sold the cattle and deposited the proceeds in the bank, and that the bank should apply the money so deposited to the payment of such checks exclusively: Held, that the money so deposited could not have been applied by the bank to the payment of said note, and that a surety thereon, who

was not a party to said agreement, was not released by the failure of the bank to so apply said deposits: *Wilson v. Dawson*, 52 Ind., 513.

This case proceeds upon the theory that the deposit was of a special character, and that the creditor having received it as such was bound to so apply it and had no right to apply it otherwise.

It, however, would be the same if there were no special agreement as to the deposit: *National Bank v. Smith*, 66 N. Y., 271.

Where in order to prove an extension discharging a surety it is necessary for him to identify the bond, payment of which was extended, he cannot give parol evidence of its contents without due notice to produce it: *Kerr v. Boulton*, 25 Upper Can. Q. B., 282.

As to allowing parol proof to vary a release under seal of the principal debtor by showing it was, through mistake, too broad, see *Fowler v. Perrin*, 25 U. C. Q. B., 227; *Bank v. McFaul*, 17 Grant's (U.C.) Chy., 234.

A compromise agreement between debtor and creditors, whereby the debtor is to be discharged in full upon payment of a certain portion of his debts, when executed and a written discharge given in pursuance thereof, is binding upon all the creditors, and a complete discharge to the debtor; and such discharge need not be under seal. Discharge of a principal discharges a known surety: *Paddelford v. Thacher*, 48 Verm., 574.

[1 Queen's Bench Division, 546.]

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[IN THE COURT OF APPEAL.]

546] *THE RIVER WEAR COMMISSIONERS V. ADAMSON and Others.

Harbors, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27), s. 74—Non-liability of Owner of Vessel for Damage to a Pier, caused by the Vessel being driven against it by Stress of Weather without Default of any one.

The defendants' ship was driven on shore by a storm in endeavoring to make the port of Sunderland. The crew were taken off with difficulty, and the ship, being a complete wreck, was afterwards driven by the winds and waves against the pier belonging to the harbor, and did damage to it, for which the commissioners brought an action under s. 74 of the Harbors, Docks, and Piers Clauses Act, 1847 (10 Vict.,

c. 27), which enacts that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float, or by any person employed about the same, to the harbor, dock, or pier, or the quays or works connected therewith."

Held, that the language of the section, though general, must be interpreted with reference to the well-known principle of the common law, that a person is not to be made liable for damage caused by his property, without any default of his, through what is generally termed the act of God; and that the defendants were therefore not answerable under the section.

Dennis v. Tovell (Law Rep., 8 Q. B., 10) overruled.

APPEAL from the decision of the Court of Queen's Bench, refusing a rule to enter a verdict for the defendants or a nonsuit.

The declaration charged that the plaintiffs were possessed of a pier at the Sunderland Docks, by virtue of their acts of Parliament, and the defendants were the owners of the steamship *Natalian*; that damage was done by the steamship to the pier to an amount exceeding £50, whereby and by virtue of s. 74 of the Harbors, Docks and Piers Act, 1847 (10 Vict. c. 27) (1), the defendants were answerable to the plaintiffs.

Plea, *inter alia*, not guilty.

*At the trial before Quain, J., at the Durham [547] summer assizes, 1873, the following facts were undisputed. The defendants' ship *Natalian*, on the 17th of December, 1872, when on a voyage from the Thames to the Tyne, was necessarily compelled by stress of weather and the violence of a storm to endeavor to enter the Sunderland Docks, by an entrance from the sea, as the only possible means of saving either the ship or the lives of those on board.

When the *Natalian* was properly pointed for the entrance, and whilst still outside it, and in the open sea at the distance of about sixty yards from the breakwater (the nearest of the plaintiffs' works) she struck the shore, and the lives of all on board were put in great peril, owing to the violence of the storm. The crew and other persons on board were saved by the rocket apparatus. At the time of the rescue of the crew and their necessary quitting of the ship she still

(1) 10 Vict., c. 27, s. 74: "The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbor, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same; and the

undertakers may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of."

remained where she had struck, about a hundred yards from the plaintiffs' pier. When the ship struck and the crew left the tide was low; some hours afterwards, when the tide rose, the ship was driven by the storm against the pier, and beaten against it so as to cause part of the damage. The rest of the damage was caused in a similar way at several subsequent tides. The storm continued to rage during the whole of the time between the quitting of the ship by her crew and the doing of the damage. At no time after the quitting of the ship was it possible for the crew or any other persons to go on board the ship or in any way obtain control of her; and before the doing of the damage the ship had become a complete wreck.

A verdict was entered for the plaintiffs, the amount to be ascertained by an arbitrator (which has since been assessed at £2,825), with leave to move to enter a nonsuit, or a verdict for the defendants.

The Court of Queen's Bench, in Michaelmas Term, 1873, refused a rule, on the authority of the case of *Dennis v. Tovell* (¹), Blackburn, J., expressing a hope that the Court of Appeal might see their way to a contrary conclusion. 548] **Gorst*, Q.C. (with him *Greenhow*), for the defendants: This case is distinguishable from *Dennis v. Tovell* (¹). Here the ship was derelict with no one on board; there the crew were all on board. It is obvious that the section contemplates some one being on board, the second clause shows this, which makes the person in charge, if guilty of negligence, also liable for the damage. But, secondly, this court is not bound by the decision in *Dennis v. Tovell* (¹). The proviso at the end of the section as to the non-liability of the owner when a pilot is compulsorily on board, shows that the section cannot be intended to be taken in the extreme generality of its language.

[MELLISH, L.J.: Where a duty or liability is imposed by contract, the act of God is not excepted, unless expressly excepted: but where the duty or liability is imposed by common law, there is such an implied exception of the act of God. Is not that principle applicable to the construction of a statute as well as to the common law?]

The court then called upon

Herschell, Q.C., and *Shield* (with them *C. Russell*, Q.C.), for the plaintiffs: The section is in the most general and absolute terms, and the court will not imply any exception merely because putting a plain natural construction upon the terms used may, in certain circumstances, work what

(¹) Law Rep., 8 Q. B., 10.

seems to the court a hardship. But, after all, there is no great hardship; one of two innocent persons must suffer, and it may well be that the Legislature thought the owner of the movable thing, the ship, which does the mischief, and must have been brought to the spot by the agency of the owner, should suffer and pay for the damage, rather than the owners of the immovable thing, the pier or harbor works. It is clear that it was intended to extend the liability of the shipowner beyond the common-law liability for negligence; the section would be nugatory if it meant no more than this; and the proviso as to the pilot shows this, for otherwise there would have been no necessity for the proviso.

JESSEL, M.R.: No doubt there are difficulties attending any *construction of the section upon the construction [549 of which we are called upon to decide. It is equally indubitable that a mere literal construction would, on a consideration of the nature and objects of the statute, lead one to the conclusion that in every case the owner of the vessel was to be liable for any damage done by his vessel to the harbor, dock, or pier. But the consequences to which such a construction would lead are so startling that I think we must consider that they could not have been in the contemplation of the Legislature.

The first proposition is this: that if a vessel is driven by stress of weather, without the fault of any one, and is shipwrecked against the pier, the unfortunate owner of the vessel must not only lose his vessel by shipwreck, but have to pay for the damage done to the pier. It is something like the kind of hospitality which in the long past was shown to vessels when they had the misfortune to be wrecked on this coast. That would be a very startling conclusion to arrive at; but the matter does not stop there; because, if the vessel were driven against the pier by the undertakers themselves, so that it was their wrongful act which caused the vessel to be driven against the pier, the damage would still be done by such vessel. So that a literal construction would lead to this result, that the person who did the act might make the person who was wholly innocent pay for the damage occasioned by such wrongful act. There are many other cases which might be put. One was put in argument, perhaps not so probable as the first, but perhaps not more improbable than the second: the vessel might be taken by the Queen's enemies, and before condemnation used either as a battering ram or otherwise against the pier, and then being recaptured, the unfortunate owner, in whom the title would revert, would be liable for damages done to the pier

by the Queen's enemies. A great number of other cases equally startling might be put as the result of construing the section literally. If that construction leads to so absurd and revolting a conclusion, then, if it is capable of any other fair interpretation, I think it is the duty of a court of construction so to read the section. In the first place, the enactment is to be limited. There is a proviso at the end of 550] the section : "Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel when such vessel shall, at the time when such damage is caused, be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of." The reason, which appears tolerably obvious to my mind, for that proviso is this : the owner is compelled by law to put the vessel in charge of the pilot, and he ought not to be liable for the acts of the pilot when the state takes the charge of the vessel from him and puts it into the hands of somebody else ; the pilot may be liable, but the pilot is only liable for negligence ; so that if, in the case I put of storm or tempest, or if, as we lawyers call it, by the act of God, the vessel is driven against the pier when a pilot is on board, the loss in that case would fall on the pier owners. Therefore, there is one case in which, at any rate, the pier owners are to take the chance, which every owner of a pier must know must result from the action of the weather, of damage, in the same way as he might be damaged by a thunder storm, or by any other accident independently of any vessel being concerned in doing the damage ; it appears to me, therefore, judging from that proviso, that the Legislature did not intend to make the owner of the vessel always liable where the matter happened from causes entirely beyond his control.

Therefore we are driven back on the familiar maxim of law, that where there is a duty imposed, or a liability incurred, as a general rule, there is no such duty required to be performed, and no such liability required to be made good, where the event happens through the act of God or the Queen's enemies. Considering that that is the general rule of law, looking at the general object and purview of this act of Parliament, and considering the exception I have mentioned, I think we may well come to the conclusion that the act of God and the Queen's enemies were not intended to be comprised within the first words of the section ; and, consequently, in this case the defendants ought not to be held liable.

Therefore I think the decision of the court below must be reversed.

*KELLY, C.B.: I entirely agree with Mr. Herschell [551 in the argument he has urged, that we are not to disregard the express terms of an act of Parliament merely because their literal construction does not provide against a possible case of inconvenience or even of injustice. But there are certain principles of law, which, though not expressed either in the common law, or in the judgments of judges, or in the language of acts of Parliament, nevertheless must be held to qualify all that fall from judges in expounding the common law, and all that is to be found throughout the statute book in the various acts of Parliament. Among those principles and maxims is this: That no man can be made answerable, unless by express contract, for any mischief or injury occasioned to another by the act of God. And the justice of that maxim, and that it does apply to all cases, except where by express contract it is otherwise provided, is so clear, that I think that we ought to apply it to the present case; and, on the general language of this act of Parliament, though at first sight it seems to provide that the owner of the vessel shall be liable whenever it comes in contact with the pier, yet that we must qualify that provision by introducing into it the maxim of the law, that no man is to be answerable for the consequences of the act of God. There is really something repugnant to common sense and to the first principles of justice to hold that any man shall be answerable for any injury done to a pier or any other property of any company, corporation, or individual, where by the force of the winds and waves, which no man can resist, and which in every sense of the word are to be deemed the agents of God, a vessel is driven against a pier, or any other objects of a similar nature. I think, therefore, on the ground that it is implied in the act of Parliament that the exception of the act of God will protect the owner against the liability imposed by the literal terms of the enactment, we cannot hold the defendants liable here.

But I must say, upon a technical consideration of the language of the act of Parliament, I go further, and I think that, reading the whole of it together, it contemplated the case of a vessel or float of timber, which was in charge of some person or persons. *The words are, "The [552 owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same,

to the harbor, dock, piers, or the quays or works connected therewith." If it had stopped there, no doubt the provision would have been general, absolute and imperative; but it does not stop; there is a comma in the act of Parliament after the word "therewith," and the section proceeds, "and the master or person having the charge of such vessel or float,"—that is continuing the same sentence, and therefore seems to imply that the sentence refers to a vessel of which some master or some other person has the charge,—“and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall *also* be liable to make good the same, and the undertakers may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same.” Then what is the meaning of the word “also?” There is to be super-added to the liability of the master or person by whose wilful act or negligence the mischief is occasioned the liability enacted by the statute. It appears to me that is a reasonable construction of the words of the statute itself, even apart from the implication to which the Master of the Rolls has alluded, and in whose observations I entirely concur, that as to anything resulting from the act of God the defendants cannot be held liable.

I would only observe, with regard to what has fallen from the Master of the Rolls, if it had been intended by the Legislature that from whatever cause, whether through the wilful act or negligence of the master or other persons, the pier had been injured, nevertheless the owner should be liable, they would never have introduced into the same sentence the proviso that where there is a pilot on board whom the owner is bound to employ, who takes the management of the vessel out of his hands, then the owner shall be no longer liable. An observation may be made upon this question which fortifies the construction which I must say, speaking for myself, I put upon the section. Taking it altogether, though this section exonerates the owner, it does 553] not exonerate the master *or any other person through whose wilful act or negligence the mischief is occasioned. It says the owner shall be liable where either the master or person in charge of the vessel by wilful act or by negligence occasions the mischief to the pier, or runs the vessel against the pier, save only in the case of the pilot; but it also goes on to provide,—and that is the principal object of that part of the section,—that in addition to the liability of the owner, which no doubt is specially enacted,

the individual who is the wrongdoer and who occasions the mischief in question, whether the master or the person in charge, shall be likewise liable as well as the owner.

I think, therefore, that on all these grounds the defendants are not liable, and consequently the judgment of the court below ought to be reversed.

MELLISH, L. J.: I am of the same opinion. I think, looking at the language of the section, it clearly was the intention of the Legislature to extend the liability of the owners of vessels, in favor of the owners of piers and harbors, beyond the liability which is imposed on them by common law: because, if that is not the intention, it is not easy to see the object of the section at all. Looking at the pointed language in which negligence or wilful act is brought in, looking to the fact that the section goes on to speak of the master, or the person having the charge of the vessel, it seems to show clearly that the owner is intended to be liable even in the case where neither the master nor the crew had anything to do with it. But the question arises, because we may decide, on the language used, that the owner may be made liable where it is not proved that he or the master was guilty of negligence, are we bound to hold that in every case whatever, where the vessel physically damages the pier, &c., the owner is so liable? I am of opinion that the statute only contemplates the case where either directly or indirectly, through the act of man, the vessel is caused in some way or other to run against the pier. It is quite consistent with our law that in certain cases a person may be made liable as insurer against the acts of all the men whom he may have under his control. And many examples of that may be put. *But although that is the case [554 with regard to the act of man, the act of God is in view of the law opposed to that which may be said to be the act of man, and the act of God does not impose any liability on anybody. Although, of course, the Legislature are not bound by any such rule, and may make a person liable for what is the consequence of the act of God, if the Legislature is so pleased; yet in construing the words of an act of Parliament we are justified in assuming the Legislature did not intend to go against the ordinary rules of law, unless the language they have used obliges the court to come to the conclusion that they did so intend. Then the question is, looking to the whole of the section, did the Legislature intend to make the owner of the ship liable only for the act of man, or did they intend to make him liable for the act of God—in other words, where, without his own fault or the

fault of anybody whatever, but through the violence of nature, the vessel has been driven against the pier? Looking at it so, without going through the words of the section again, it appears to me that I am bound to agree with the remarks which have been made by the Master of the Rolls and by the Lord Chief Baron; and that the section points to something that is done by the act of man, or to the act of the person in charge. It looks as though the Legislature considered that, somehow or other, through the act of man damage might be done to the pier, and then, in order to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that person was the servant of the owner, they say the owner shall be liable; but if it was the consequence of the negligence of somebody else that person is not discharged, and you may have your remedy over. Then they make one exception to that rule in the case of a pilot. They say if a pilot is in charge of the vessel, even although it may be by his act, the owner will not be liable. I do not think that it was intended by the Legislature to put upon the shipowner the absolute liability occasioned by the ship being driven against the pier when she is really on the high seas, and thence being driven from outside the harbor by the violence of the winds and waves against the pier. Therefore I agree that the judgment should be reversed.

555] *DENMAN, J.: I am of the same opinion. No doubt, taking the words of s. 74, it is possible to hold that they impose an absolute liability to the dock-owner on the part of the owner of the vessel. The words are strong, intelligible and grammatical. [The learned judge read the first part of the section.] But I am of opinion, taking the rest of the section, some qualification must be put on those words, not by introducing fresh words into the act of Parliament, or supposing a clause to exist in it which does not exist, but by qualifying those words by the principle of law which is so well known, and which must be taken to override the language of an act of Parliament. I apprehend that there is no principle of law better established than this, that in an act of Parliament words are not to be construed to impose upon individuals a liability for an act or acts done, if those acts are not done by the individual, or not caused by his property or his servants, but are acts which are substantially caused by a superior power, such as the law calls the act of God. In this case there can be no doubt, from the facts, that the injury occasioned by the vessel was not the result of any neglect on the part of the owner, or on the part

of any person having charge of the vessel, or, indeed, of any human being, but it was really the effect of the violence of the winds and waves overcoming all control on the part of the master or owner of the vessel, and forcing the vessel against the pier. Under those circumstances I apprehend, on the general principle that every statute is to be so construed as to leave untouched a principle of common law which applies to all similar cases, we are not bound to hold—and ought not to hold—that the damage was done by the vessel within the meaning of the act of Parliament; but that, on the contrary, it was damage occasioned by the act of God, and therefore no action lies.

With regard to the other words of the section, I think a strong argument arises from the clause which contemplates the punishment of a person who has charge of the vessel. I do not, myself, however, go so far as to think that there might not be a case where the owner of the vessel would be liable when no person was in charge. If there was a person appointed, although not on board, but who ought to have been controlling the vessel, and *through [556 his negligence the accident is occasioned, I think the section would apply. Therefore I should put that qualification on the generality of the proposition that the damage must be the act of man. I think this section does not exclude the exception of the act of God, which, in my opinion, was the sole cause of the accident here; and so thinking, I hold the defendants are not responsible.

POLLOCK, B.: I am of the same opinion, although the process of reasoning by which I have arrived at that conclusion is not the one which has been adopted by the other members of the court. We are bound to put a reasonable construction on the section. To put a reasonable construction is not to put a construction which might produce the result that may appear to the court reasonable, but it is to apply to the section that meaning which would seem to carry out the intention of the Legislature as applied to the subject-matter with which they were dealing. I find in this Docks Act clauses providing for the cleaning of the dock, the protection of things in the dock, and all the necessary provisions with regard to vessels and timber-floats which may be placed in the dock, or which are going into the docks, or going out of the docks. Looking at it in this aspect, one of the things the section in question intends to provide is, that in the event of the structure of the dock being injured by vessels or floats of timber, the owners of the dock are not

to be put to the proof of negligence, or to the proof of how the injury was occasioned.

I am not prepared to say that, if it was the case of damage done during the night to one of the dock gates by a float of timber, that it would be any answer to say it arose from some unforeseen cause or accident against which human providence would not provide. I do not know what would be meant in that case by the act of God. We know what is meant by the act of God in the case of lightning, &c. I do not know how it may be as to matter as to which the providence of mankind may or may not prevent a particular result. Therefore, if that were the case here, I should pause before I came to the conclusion at which the rest of the 557] court have arrived; but this is a case in which *the vessel was extraneous to the dock entirely; out on the high seas, she met with certain risks and injuries which compelled her crew to leave her, and she became derelict, and in that condition, being wholly extraneous of the dock, she is by force of the elements driven against it; that seems to me to be an event which the section did not intend to provide against, and there is nothing, looking to the subject-matter and the difficulty of providing against it, unjust or unreasonable in holding it not within the section. In all other respects I agree with what has been said by the rest of the court, and I think the judgment ought to be reversed.

Judgment reversed and entered for the defendants.

Solicitor for plaintiffs: *J. W. Hakin*, for Ralph Simey, Sunderland.

Solicitors for defendants: *Johnson & Weatheralls*, for E. H. Haswell, Sunderland.

See 16 Eng. Rep., 223 note; 10 Eng. Rep., 117-8 note.

As to what is and to what is not an accident for which the party is not liable, see 14 Eng. Rep., 556 note.

Where B. seized A. by the arm and swung him violently around two or three times, then letting him go, and A. having been thus made dizzy involuntarily passed rapidly in the direction of and came violently against C., who instantly pushed him away, and A. then came in contact with a hook and sustained injury: Held, that A. might maintain trespass *vi et armis* against B.: *Ricker v. Freeman*, 50 N. H., 420; *Van Denburg v. Truax*, 4 Den., 464; *Washburne v. Cooke*, 3 Den., 112; *Conklin v. Thompson*, 29 Barb., 218;

Burnham v. Butler, 81 N. Y., 485; *Ryan v. N. Y.*, etc., 85 N. Y., 214; *Rose v. U. S.*, etc., 3 Abb. Pr., N.S., 410; *Mills v. N. Y.*, etc., 2 Rob., 331.

As a general rule, one is liable for the consequences of his fault only so far as they are natural and proximate, and may therefore be foreseen by ordinary forecast; not for those arising from a conjunction of his fault with circumstances of an extra-ordinary nature.

A man mounted a pile of flag stones in a street to make a public speech: a crowd of hearers gathered about him, some of whom also got on the stones and broke them: Held, it was not a legal conclusion that the speaker was liable for the breaking of the stones by

the by-standers. It was a question for the jury whether the defendant's making the speech in the street was the proximate or remote cause of the injury. Making a speech in the street is not *per se* a nuisance: *Fairbanks v. Kerr*, 70 Penn. St. R., 86. See 1 Cow. Tr. (Kingsley's ed.), §§ 516-8.

Where the defendant ascended in a balloon which descended into the plaintiff's garden, and the defendant becoming entangled in it and in a perilous condition, called for help and a crowd came to his assistance, treading down the garden, it was held that the defendant was liable for the injury: *Guille v. Swan*, 19 Johns., 381; *Ryan v. N. Y.*, etc., 35 N. Y., 215.

If A. rouses B. from a drunken stupor, and endeavors to assist him to a court where B. is required as a witness, doing this as a friendly act, in a gentle manner, with an honest purpose to do B. no injury, but only to aid him in reaching the court, A. is not liable in damages for such acts, although during their performance B. may suffer an accident or injury caused by an agency for which A. is not responsible.

Where the question of an honest and friendly purpose in the acts complained of is at issue, plaintiff may show that the defendant had engaged at the time in a conspiracy to injure him, where that fact will have a direct bearing upon the question of motive in the acts alleged. But mere declarations of a third person are not admissible in proof of such a conspiracy, without evidence that such person was one of the conspirators: *Hoffman v. Eifers*, 41 Wisc., 251.

Where the defendant fired a pistol, the ball of which glanced and hit the plaintiff, and it was found that the injury was unintentional but was the result of gross and culpable carelessness on the part of the defendant, it was held that trespass *vi et armis* would lie: *Welch v. Durand*, 36 Conn., 182; *Morris v. Platt*, 32 Conn., 75.

To an action upon a recognizance or an obligation, impossibility by act of God is a good defence, as death, preventing the prosecution of an appeal to "effect": *Earl of Leitrim v. Stewart*, Irish Law Rep., 5 C. L., 27.

There is some conflict in the cases whether a surety to a bond in replevin, or to release property on attachment, is

exempted from liability by the death of the property replevied, or attached before judgment, or by the passage of a statute preventing a return—as emancipation of slaves.

See *Moak's Van Sant*, Pl., 694, and cases there cited.

That he is excused, see *Irvin v. Hume*, 50 Miss., 419; *Edson v. Weston*, 7 Cowen, 280; *Bolo v. Patton*, 6 Heisk. (Tenn.), 173; *Ide v. Fassett*, 48 Verm., 68; *Walker v. Osgood*, 53 Maine, 422; *Carpenter v. Stevens*, 12 Wend., 589; *Atkinson v. Foxworth*, 53 Miss., 741.

See *Dexter v. Norton*, 47 N. Y., 62.

That he is not: *Wilkerson v. McDougal*, 48 Ala., 517; *Drake v. White*, 117 Mass., 10; *Suydam v. Jenkins*, 8 Sandf. Superior Court, 644, disapproving *Carpenter v. Stevens*, 12 Wend., 589.

As to where title is, on discontinuance of replevin suit, without judgment for a return of the property to defendant: see *Yates v. Fassett*, 5 Denio, 21, 34; *Montgomery v. Ellis*, 6 How Prac., 326, 329; *Cowdin v. Pease*, 10 Wend., 333; *Cowdin v. Stanton*, 12 Wend., 123; *Austin v. Chapman*, 11 N. Y. Leg. Obs., 103, not elsewhere reported.

Replevin cannot be maintained by one copartner for copartnership goods, although they are in the hands of the officer under an attachment of another's copartnership's interest therein.

Where the interest of one of two partners in partnership property is attached upon a demand against him alone, and the other partner replevies, in his own name, the property from the possession of the officer, and a nonsuit is ordered in the action of replevin, the defendant in such replevin is entitled to an order for the return of the articles replevied, although the plaintiff in the replevin suit offers to show the insolvency of the copartnership and the insufficiency of its assets to pay its own debts. But such insolvency may be shown in an action on the replevin bond, if neither side has before hand taken proceedings to have an account of the partnership affairs settled by a court of equity: *Hacker v. Johnson*, 66 Maine, 21.

So if an act of the law-making power prevent performance, as emancipation of slaves, it is a valid defence: *Irvin v.*

Hume, 50 Miss., 419; County, etc., v. City, etc., 21 Upper Can. Com. Pl., 98.

A lessor covenanted to rebuild. The building, a wooden one, was burned. An ordinance of the town council, passed after the demise, forbade the erection of a wooden building. The lessor filed a bill to cancel the lease. This the court refused, but directed a reference to a master to fix a proper rent to be paid by the lessee upon the lessor rebuilding with brick, with costs to be paid by the plaintiff: *Williams v. Tyas*, 4 Grant's (U.C.) Chy., 533.

Where the further prosecution of work in the alteration of a building, in the city of New York, is legally forbidden by the superintendent of buildings, under the authority of a statute for a defect not occasioned by the contractor, and he is thus prevented from performing that which, by the terms of the contract is made a condition precedent to payment, he is thereby discharged from performance, and is entitled to recover at the contract price for the work done: *Heine v. Meyer*, 61 N. Y., 171.

See *Connors v. Mayor*, 11 Hun, 439, as to powers of "department of buildings" in controlling what buildings shall be erected.

In Upper Canada, in one case, it was doubted whether it was a defence to one who had agreed to tow a vessel that his vessel was unavoidably frozen in the ice: *Dorland v. Benton*, 5 Upper Can. Q. B., 583.

But see 10 Eng. Rep., 118 note.

Snow storms of such violence as to obstruct the passage of trains must be allowed to excuse delays by a railroad in transporting animals during the continuance of the obstruction: *Pruitt v. Hannibal*, etc., 62 Mo., 527.

Though if there are two routes and one be open, the closing of the other is no defence: 10 Eng. R., 118 note; *Read v. St. Louis*, etc., 60 Mo., 199.

Where a contract is made for the sale and delivery of *specified articles* of personal property under such circumstances that the title does not vest in the vendee, if the property is destroyed by an accident, without the fault of the vendor, so that delivery becomes impossible, the latter is not liable to the vendee in damages for non-delivery: *Dexter v. Norton*, 47 N. Y., 62; *Niblo v. Binsse*, 3 Abb. Dec., 375.

See 10 Eng. Rep., 117 note.

That a contract was entered into through mistake of facts will not always excuse, if both possess equal means of information or the fact is doubtful in its nature. Two banks, defrauded by two different persons, supposed to be the same, agreed to unite in an effort to capture the supposed thief, and to divide the expenses incurred in proportion to the amount lost by each, as well as any money which might be recovered. One being captured with the sum taken from the bank he defrauded, it was held that this bank could not be relieved from the agreement, though made under a misapprehension of the facts as above stated: *Western, etc., v. Farmers, etc.*, 10 Bush (Ky.), 669.

A party who has entered into a contract to make and deliver a certain manufactured article within a specified time, having ample time for performance, cannot postpone performance to the last moment and then excuse it upon plea of an accident; in such case he takes the responsibility of the delay. An accident is not an excuse for a failure to perform such a contract, even if it prevent performance. If protection is sought from such a contingency it must be specified in the contract: *Booth v. Spuyten Duyvil, etc.*, 60 N. Y., 487, distinguishing *Dexter v. Norton*, 47 N. Y., 62.

Where an attorney took a conveyance of a tract of land to secure his fee for services to be performed in certain specified cases, of which services his death prevented more than a partial performance, a proper proceeding would be by bill against his estate, to set aside the conveyance upon a tender of so much of the fee agreed upon as was found to be really due; but when the land was sold by his estate, plaintiff might recover back the surplus proceeds over and above the ascertained value of such services. In such case the administrator could not defend against the recovery of such surplus, by showing a readiness to perform the remaining service through another attorney: *Callahan v. Shotwell*, 60 Missouri, 398.

Where inability to perform arises from a superior power, as the taking of lands by virtue of the power of eminent domain or by virtue of an act of

the legislature performance is excused, and if land were so taken it would not be a breach of covenant against ouster by a landlord: *Sauer v. Baldwin*, 11 Upper Can. Com. Pl., 353.

The tenant would be bound to pay rent though thereby deprived of the use of the demised premises: *Lyman v. Snarr*, 9 Upper Can. Com. Pl., 104.

The tenant in such case is, within the statute, an "owner," and entitled to compensation for the injury to his estate from the taking of the property under the right of eminent domain: 1 Redf. on Railw. (5th ed.), 361, part III, § 83; *People v. Brand*, 36 How. Prac. Rep., 544, 548; *Watson v. N. Y.*, etc., 6 Abb. Prac. Rep., N.S., 91; *Marsden v. Cambridge*, 114 Mass., 490; *Inhabitants, etc., v. County*, etc., 114 Mass., 481; *Lester v. Lobby*, 7 Ad. & Ellis, 124, 34 Eng. C. L.; *Matter of Water St.*, 7 Philadelphia R., 457; *Johnson v. O. S.*, etc., 11 Upper Can. Q. B., 247; *Bourgouin v. Montreal*, etc., 19 Lower Can. Jur., 57.

A mere naked trustee of an equitable interest in lands is not entitled to notice of proceedings to acquire title thereto for public purposes. Notice to the party having the equitable interest is sufficient. He is the "owner": *McIntyre v. Eaton*, etc., 26 N. J. Eq., 425.

The purchaser of land is not entitled to damages for an injury committed (by the construction of a railway through the land) prior to the time of his becoming possessed, and a mandamus to compel the railway company to appoint an arbitrator to assess such damages was refused: *Partridge v. Great Western*, etc., 8 Upper Can. Com. Pl., 97.

A mortgagee is entitled to notice of such a proceeding and to the damages awarded thereon. The company is bound to take notice of a registered mortgage: *Dunlop v. York*, 16 Grant's (U.C.) Chy., 216.

The word "ground" in such a statute is synonymous with "land," and is not confined to such only as is bare of buildings: *Ferree v. Sixth*, etc., 76 Penn. St. R., 376.

One purchases stock in a bank deliverable on a certain day. Before that the time for performance was extended at the purchaser's request and for his accommodation. Before the day of extension, but after the day first fixed,

the bank failed. Held, the purchaser was bound to take and pay for the stock: *Sheppard v. Murphy*, Irish Law Rep., 2 Eq., 544, reversing 1 id., 490.

In case of injury to goods the act of God cannot be set up as a defence by the carrier, if guilty of previous misconduct or neglect, by which the exposure resulting in the loss was occasioned: *Armentrout v. St. Louis*, etc., 1 Missouri App. Rep., 158; *Michaels v. N. Y.*, etc., 30 N. Y., 564; *Read v. Spaulding*, 30 N. Y., 630; *Read v. St. Louis*, 60 Mo., 189.

But see *Railroad Co. v. Reeves*, 10 Wall., 176; *Stedman v. Western*, etc., 48 Barb., 97, 100.

A common carrier is liable for loss or injury caused by delay from the refusal of its employees to do duty: *Pittsburgh, etc. v. Hazen*, 4 Am. Law Times Rep., N.S., 83, Supreme Court; *Ills.*; *Weed v. Panama*, etc., 17 N. Y., 362; *Blackstock v. N. Y.*, etc., 20 N. Y., 48, affirming 1 Bosw., 77; *Michaels v. N. Y.*, etc., 30 N. Y., 564; *Read v. Spaulding*, 30 N. Y., 630; *Read v. St. Louis*, etc., 60 Mo., 189.

But not for loss or injury caused by delay resulting from the lawless violence of former employees "on a strike": *Pittsburgh v. Hazen*, 4 Am. Law Times Rep., N.S., 88.

Where a party agrees to complete a building to the satisfaction of an architect, and if disapproved, such disapproval to be in writing, the parties may waive the provision as the disapproval being in writing when an oral expression of dissatisfaction by the architect, is good.

Where the contract provides that no extras should be allowed unless agreed upon in writing and such writing produced before payment therefor: Held, there could be no recovery for extras, no writing therefor having been produced.

The owner of the land having taken possession of the building which was thereon, held that this would not entitle the plaintiff to recover: *Oldershaw v. Garner*, 38 Upper C. Q. B., 37, approving *Munro v. Butt*, 8 Ellis & Bl., 738.

See *Blakeslee v. Holt*, 42 Conn., 226; *Pickering v. Greenwood*, 114 Mass., 479.

Under a contract for building, the payments to be made in instalments as certain parts of the work is finished, if

the structure, while in progress, be destroyed by inevitable accident, the builder is entitled to be paid such instalments as are fully earned; but he has no claim for a proportional part of the next instalment partially earned. The right to recover in such case differs from one where the entire compensation is to be paid on completion of the work: *Richardson v. Shaw*, 1 Missouri App. Rep., 234; see, however, 10 Eng. Rep., 117 note.

The owner of an unfinished house being built by contract may recover for injuries thereto from a negligent obstruction of a sewer by the agents of a city, even though the contractor be bound by his contract to deliver a completed house notwithstanding such injury: *Nims v. Mayor, etc.*, 59 N. Y., 500.

Where a contractor was bound to fully perform an agreement to build a house, and the owner accepted an order by the contractor upon him "payable when payment is due," held the holder of such order could not recover thereon if the contractor failed to fully perform his contract, though the owner promised the holder after such failure to pay it; such promise was without consideration: *Crane v. Knubel*, 61 N. Y., 645; *Bell v. Harrison*, 3 N. Y. Weekl. Dig., 106, N. Y. Court of Appeals.

See *Gallagher v. Nichols*, 60 N. Y., 438; *Loftus v. Lee*, 18 Upper Can. Q. B., 195; *Bell v. Harrison*, 3 N. Y. Weekl. Dig., 106.

Where one contracts with the owner of lands to erect a building thereon, it is the duty of such owner to provide a reasonably safe place for such erection, and he undertakes that the place chosen is free from danger, and if the building be destroyed by the falling of a wall the builder may recover for what he has done, unless he assumed the risk of danger from the condition of the property: *Sennott v. Mullin*, 82 Penn. St. R., 333.

Where labor is performed and materials furnished under a contract to do the carpenter's work, only, of a building, the risk of destruction by fire to be on the owner, and the building is destroyed by fire, so that the workman is prevented, without fault on his part, from completing his contract, a decree giving him a mechanic's lien on the lot for the sum due him for work and material will not be disturbed: *Sontag v. Brennan*, 75 Ill., 279.

Where the contractor agreed to do only the carpenter and joiner work of a brick cottage, the destruction of the house before it is finished will not prevent a recovery for the work already done: *Hubbard v. Walker*, 13 Upper Can. Q. B., 205.

See 10 Eng. Rep., 117 note.

Where a contractor fitted windows, doors, etc., to a house on the lands of another, but before they were actually affixed a creditor of the owner of the land levied on them, held no title had passed from the contractor: *Johnson v. Hunt*, 11 Wend., 135.

So where the contractor, to make certain repairs, drew the lumber therefor to the house but abandoned the job: Held, no title passed from him, and if the owner of the house used the materials, he was guilty of a conversion: *Abbott v. Blossom*, 66 Barb., 353.

See *McConihe v. N. Y., etc.*, 20 N. Y., 495.

Defendant agreed to put up a building for the plaintiff for £450, and to take in payment thereof from him £250 in materials, at the cost prices, or such quantity as the said building should require, and the balance, if any, in cash. The timber had been all furnished, and the building partly completed, when it was blown down, and the design of going on with it abandoned. Held, that the timber so delivered belonged to the defendant: *Graham v. Wiley*, 16 Upper Can. Q. B., 265.

[1 Queen's Bench Division, 563.]

Jan. 19, 1875; Feb. 26, 1876.

[IN THE EXCHEQUER CHAMBER.]

EDWARDS V. THE ABERAYRON MUTUAL SHIP INSURANCE SOCIETY (LIMITED). [563]Mutual Insurance Society, Construction of Rules of—Clauses of Arbitration and against bringing Action—Form of Policy—80 & 81 Vict. c. 23, s. 7—Specification of particular Risk or Adventure.*

The defendants were a limited company for the mutual insurance of ships belonging to members. By the articles of association: 4. No person shall become a member until he shall have signed the articles. 28. The business of the company shall be managed by directors. 39. The directors shall have full power to determine all disputes arising between the society and members concerning insurances or claims upon the society; and the decision of the directors shall be final and conclusive, as well upon the society as the members; and no member shall be allowed to bring any action or suit against the society for any claim upon the society, except as is provided by these presents; and the directors may, if they think fit, cause any of such claims, and the amount to be paid to any member, to be referred to the decision of an average adjuster, and his decision shall be final and conclusive on the society and claimant, and no appeal shall be allowed therefrom. 40. Two directors specially authorized and the chairman shall alone have power to sign and execute all policies approved by a board of directors. 63. If any member sell any vessel insured by the society, the purchaser of such vessel, if not a member, shall have no claim upon the society; and if a member, he shall have no claim until the vessel be entered in his name on the books of the society. 83. In all cases of any vessel insured by the society being lost or damaged, the owner, master, or mate or crew, shall, as soon as possible, give notice to the secretary of the society, who shall summon the board; and the directors shall proceed to examine the owner, master and mate, and such of the crew as they may think necessary, as to the cause of the loss or damage, and shall make such decision as in their judgment the case may require. 84. If any member is dissatisfied with the decision of the directors as to the settlement of any loss or damage sustained by him, and such member shall procure ten members, not being directors, to join in a requisition to the directors to reconsider their decision, a board of not less than ten directors shall reconsider such decision.

In December, 1868, the plaintiff became equitable mortgagee of the ship H., D. being registered owner. In January, 1869, D. insured the vessel with the defendants, directing the policy to be made out in plaintiff's name; this was not done, but the policy was forwarded by the defendants to the plaintiff. The policy was headed with the name of the defendants' society, and after giving details as to the rates of insurance, &c., and referring to one of the rules or articles, at the bottom was: "March, 1869. This is to certify that Mr. D., as ship's husband for the H., whereof is master at present time D., has this day paid £17 10s. for the insurance of fifty-two shares on the said vessel. Value of ship as per rule for this class, £7 10s. per ton, £1,215." The policy was duly signed by the chairman and two directors. [564] In January, 1870, the ship being on a voyage, the plaintiff applied in his own name for a renewal of the policy, and paid the premium, and a policy was forwarded to the plaintiff by the defendants, which was precisely like the former, except that the plaintiff's name was inserted as the ship's husband. No copy of the rules was ever given to the plaintiff, and he had no knowledge of the provisions until after the loss of the vessel. In March, 1870, a call was made on the plaintiff in respect of the H. for the losses of the society for the year 1869, and plaintiff paid it. Another call was made and paid in October, 1870. In May, 1870, the H. was registered in plaintiff's name, but no notice was given of this to the defendants. In November, 1870, the H. was wrecked and became a total loss. The plaintiff sent in his claim, and on

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Edwards v. Aberayron Mutual Ship Insurance Society.

the 6th of January, 1871, D., who was master at the time of the loss, attended a meeting of the directors at their requisition, and they, having heard his account of the wreck, resolved that it was not found that the H. was lost by perils of the sea, and that the owners had no claim upon the society. No notice of this meeting or of the resolution was given to the plaintiff. On the 6th of April, 1871, a notice signed by ten members, but not signed by the plaintiff or D., was sent to defendants' office, and at the next quarterly meeting of the directors, no notice to attend having been given to plaintiff or D., the directors, without further inquiry, confirmed the former resolution. In an action brought by the plaintiff against the defendants to recover the amount of his insurance, in addition to the above facts, it was admitted by the defendants that the H. was a total loss by perils of the seas; the court having power to draw inferences of fact:

Held, in the Court of Queen's Bench (by Blackburn, Mellor, and Lush, JJ.).—1st. That the policy sufficiently specified the particular risk or adventure within the meaning of 30 & 31 Vict. c. 23, s. 7. 2d. That defendants were precluded from saying the plaintiff, who was the owner of the ship, was not a member of the society, after having accepted an insurance and taken premiums and other payments from him. 3d. That the fact that the plaintiff turned his equitable interest into a legal interest after the policy was renewed by him did not bring the case within art. 63. But 4th. That defendants were entitled to judgment: for that the contract was contained in the policy and any of the articles applicable; and that article 39, which regulated the manner of the payment under the policy, did not exclude the jurisdiction of the courts of law, but made it a condition precedent to bringing an action that the loss of the particular member should have been first decided upon by the directors, subject to the appeal given by article 84.

The Exchequer Chamber reversed the judgment of the Queen's Bench.

By Amphlett, B., on the ground, that, if the investigation by the directors had been properly conducted the action could not have been maintained; but that the conduct of the directors, by adjudicating against the plaintiff's claim without hearing him, or giving him an opportunity of being heard, was not binding on the plaintiff; and that, under the circumstances, the defendants could not take advantage of the wrong done by their agents by setting up as a defence that the determination of the directors in favor of the plaintiff was a condition precedent to bringing the action, and that an actual loss being admitted, the plaintiff was entitled to recover the amount.

By Kelly, C.B., and Brett, J., on the ground that such of the articles as were 565] *applicable must be read with the policy, and that articles 39, 83, and 84 were intended to prevent the insured from maintaining any action or suit at all in the ordinary courts in respect of any dispute arising on the policy; and that, therefore, the articles were invalid, and did not prevent the plaintiff from maintaining the action.

Archibald, J., and Pollock, B., were of opinion that the judgment ought to be affirmed, on the ground taken by the Queen's Bench.

Held, also, by Archibald, J., and Pollock, B., and *semble*, by Kelly, C.B., and Brett, J., that the policy was valid within 30 & 31 Vict. c. 23, s. 7.

CASE stated in an action brought to recover the sum of £1,000 in respect of a total loss of a vessel called the *Hermione*, alleged to have been insured by the defendants to that amount.

1. The plaintiff is a farmer residing in Cardiganshire, and the defendants are a mutual insurance society, incorporated under the Joint Stock Acts, 1862 and 1867, and established at Aberayron in that county.

The memorandum of association stated (paragraph 3) that the objects for which the company is established are the mutual insurance of ships belonging to the members of the

company, and the doing of all such other things as are incidental or conducive to the attainment of the above objects.

The articles of association contained, amongst others, the following clauses :

3. *Definition of Members.* Every person shall be deemed to have agreed to, become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

4. *New Members of the Society to be approved of by the Directors, and to execute Deed.* That no person, except the persons who have signed the copy of these articles kept for that purpose at the office of the company, previously to the complete registration of the society, shall become a member of the society, until his admittance shall have been consented to by a board of directors, and he shall have signed the copy of these articles kept for that purpose at the office.

28. *Powers of Directors.* The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not hereby required to be exercised by the company in general meeting. . . .

39. *Directors to have Power to contract and settle Disputes between the Society and Members.* That the directors shall have full power to enter into and execute, and also to modify, alter, or release any contract or agreement respecting any matter in which the society may be interested ; and to adjust, settle and decide all claims and demands upon the society by the members thereof ; or to decide and determine all disputes, controversies and matters arising between the society and members of the society concerning insurances or claims upon, or liabilities by or to the society, and concerning the laws, rules, regulations, and *by-laws of the society ; and the decision of the directors shall be [566] final and conclusive, as well upon the society as the members thereof ; and no member of the society shall be allowed to bring or have any action, suit, or proceeding, or other remedy against the society or the members thereof, for any claims or demands upon, or in respect of the society or the members thereof, except as is provided by these presents ; but no director, who shall be interested in the particular matter which shall be referred to the directors, further or otherwise than a general member of the society, or whose claims upon the society shall be submitted to the decision of the directors, shall be allowed to vote or interfere in such matter or claim ; and in case any question shall arise as to any director being allowed to vote in such matter or claim, such question shall be finally decided by the directors present at any board, exclusive of the director whose vote shall be questioned ; and the directors may, if they shall think fit, cause any of such claims and demands, and the amount to be paid to any member of the society, to be submitted and referred to the decision of any person practising as an average adjuster of marine assurances, who shall be attended by, and have the same powers of calling for, and enforcing the attendance of, claimants and other evidence, as the directors would ; and the directors, or any person on behalf of the society, and the claimant, or any person on his behalf, shall be at liberty to attend and produce any evidence before such average adjuster ; and in every such case the decision or award of such average adjuster shall be final and conclusive on the society and claimant, and every person interested in such claim, and no appeal shall be allowed therefrom.

40. *Chairman and two Directors to execute and sign Policies, Agreements, Checks, &c., for the Society.* That two of the directors, authorized by resolution of a board of directors in writing in that behalf, together with the chairman for the time being, shall exclusively have power to sign and execute all policies of assurance approved of by a board of directors, and to sign, draw, indorse and accept all agreements, bills of exchange, and promissory notes, and all checks and orders for the payment of money, all which policies, &c., but no others, shall be binding on the society. . . .

53. *Insurances to be approved of and accepted by the Directors.* That no ship or vessel, or share of a ship or vessel, of any member, shall be considered to

be insured by the society, until the insurance thereof shall have been accepted and approved of by the directors, and the acceptance thereof and the terms of the insurance entered in a book, to be kept for that purpose, by the directors, or in a policy of insurance, to be duly executed on the part of the society.

61. *Insurance to extend to Partial Loss or Damage.* That the insurance of the society shall not only extend to total loss, but also to partial loss or damage, but no claim shall be made upon the society in respect of any loss or damage whatsoever, unless such loss or damage shall amount, upon A 1 British-built ships, to four pounds per cent. upon the whole or total value thereof; upon A 1 Red British-built and A 1 colonial-built vessels, of six years and upwards to £5 6s. 8d.; upon British A 1 Black, and A 1 four years colonial-built ships, to 7½ per cent.; and A 1 Black colonial to £9 per cent. upon the whole or total value thereof.

63. *On Sale of Vessels insured.* That if any member of the society shall sell any vessel, or shares of any vessel insured by the society, his claims upon the society, and liability to contribute to the losses or damages of other members of the society in respect of such vessel or shares, shall cease as soon as the possession of such vessel or shares shall be delivered to the purchaser thereof, or the sale shall be otherwise completed, and notice in writing of the sale shall have been given by the member so selling to the secretary, but not before; and the purchaser of such vessel or shares, if not a member of the society, shall have no claim upon the society in respect thereof: and if the purchaser be a member of the society, such member shall have no claim upon the society in respect thereof, until he shall have entered such vessel or shares in his own name in the books of the society, and in all respects have conformed to the laws, rules and regulations of the society, in respect of such vessel or shares.

74. *Vessels to have Ship's Husbands.* That every vessel insured in the society shall have an agent or ship's husband, whose name and address shall be delivered by the owner or owners thereof to the secretary, and be entered by him in the books of the society; and every such agent or ship's husband shall have full power to transact and settle all matters of business with the society relating to such vessel, and to pay, and receive, and give discharges for all moneys which shall be payable from, or receivable by, the owner or owners of such vessel to or from the society; and to whom all notices and demands affecting the owner or owners of such vessel may be delivered, and when delivered, shall be binding on such owner or owners.

83. *Notice to be given of Damage or Loss of Vessels insured.* That in all cases of any vessel or share thereof insured by the society being lost, wrecked, stranded, burnt, abandoned, captured, damaged or injured, by being run down, or otherwise injured by any other vessel, the owner, master, or mate, or some of the crew, shall, as soon as circumstances will permit, give notice thereof to the secretary of the society, who shall thereupon, by letter to the several directors, summon a board of directors on the first convenient day, not exceeding seven days from the receipt of such notice; and the directors shall proceed to examine the owner, master and mate, and such of the crew as they shall think necessary, as to the cause of such loss or damage, and shall make such further inquiries, and take such measures, and make such decision and regulations thereon, as in their judgment the case shall require; and the owner or master of any vessel so lost, wrecked, stranded, burnt, abandoned, captured, damaged, or injured, shall not commence any repairs, except such as shall be deemed necessary for the immediate safety of such vessel; or settle or compromise any claims or disputes, or prosecute or defend any action or suit in relation thereto, without the previous consent of the directors.

84. *For obtaining reconsideration of Claims by the Directors.* That if any member of the society shall be dissatisfied with the decision of the directors, as to the settlement of any loss or damage sustained by such member, or as to any claim or other matter settled, adjusted, or decided by the directors, and such member so dissatisfied shall procure ten other members of the society, not being directors, to join with him in a written requisition to the directors to

reconsider and revise their decision, the directors shall thereupon call a board of directors, of not less than ten, and reconsider and revise such decision; and in case such member shall be dissatisfied with the further decision of such board of directors, such member so dissatisfied, together with twenty other members of the society may, by writing under their hands, require the secretary to summon a special *general meeting of the society, to be held [568 at any time not exceeding fourteen days from the receipt of such writing by the secretary, and such special general meeting shall have full power to confirm or vary the decision of the directors, and whatever shall be decided by the special general meeting shall be final and binding, as well upon the society as upon all the parties interested in the decision.

2. In the month of December, 1868, the plaintiff's brother-in-law, D. Davies, was about to purchase the vessel *Hermione*, and the plaintiff agreed to make him advances to enable him to purchase and repair the vessel. The terms of the agreement dated the 22d of December, 1868, were that the plaintiff agrees to lend to D. Davies sufficient money to purchase the *Hermione*, and also to advance a sufficient sum of money towards reclassing and repairing the vessel at the port of Cardiff, or to stand as surety for the same; that D. Davies could sell 32-64th shares of the *Hermione* in small shares as she was with the former owner before the end of December, 1869, and to pay back to the plaintiff the money of the whole ship with 5 per cent. interest. The agreement then stipulated that after payment of ship's expenses the profits were to be applied towards the repayment of the repairs, and that the policy of insurance was to be the property of the plaintiff. The agreement then further stated that on or before the end of December, 1869, all the purchase-money, interest and all the repairs, and every other debt due to the plaintiff were to be paid and settled, or the shares of D. Davies, whatever they may be, in the vessel were to be the property of the plaintiff from that time, and D. Davies promised to transfer his shares of the vessel at the Custom House over to the plaintiff, and to forfeit all claims and all profits from the 31st of December, 1869.

3. The vessel was insured for the first time with the defendants' society in January, 1869⁽¹⁾. The insurance was effected by D. Davies, who gave directions to the defendants' secretary that the policy should be made out in the plaintiff's name, and should be handed to him. Davies did not inform the defendants of the arrangement made, as mentioned in paragraph 2, with the plaintiff. The document was afterwards forwarded by post by the defendants to the plaintiff; it was in the usual form of policy issued by the defendants to their members. The material parts were:

⁽¹⁾ The date, however, in the policy was March, 1869.

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569] “*Aberayron Mutual Ship Insurance Society, Limited. Registered pursuant to the act 25th and 26th Vict. c. 89.

“Insurances effected on all ships classed on Lloyd’s Register Book of Shipping at the following rates, set off opposite the respective classes, viz.: [Then follow the rates.]

“No claim for damage sustained by ships insured in this society will avail unless the same will amount to the under-mentioned percentage upon their whole value, viz.: [Then followed the percentages, which are those given in article 61.]

“New ships insured shall, in case of damage thereto, be allowed the full cost of the repairs to the hull and materials for the period of twelve months from the date of the commencement of the first voyage; but all or any ships or vessels suffering damage or destruction whilst discharging or loading cargo or ballast upon or from an open beach, strand, or roadstead, shall suffer a deduction of £10 per cent. from the sum which would be payable in respect of the insurance thereof in such cases. Vide article 70.

“That no vessel insured in this society shall sail from the United Kingdom on the following voyages, after the periods limited thereto respectively, viz.: [Then follow the details.]

“In the event of any vessel insured by this society being in, or sailing from, any port in the West India Islands, the Bay of Honduras, or any part in the Gulf of Mexico, or the Spanish Main, between the first day of August and the first day of January, shall suffer a deduction of ten pounds per cent. in case of loss or average; and insurances on all vessels sailing to and from the Azores between the first day of November and the fifteenth day of March shall suffer a deduction of fifteen pounds per cent. in case of loss or average.

“That every insurance effected shall be valid and binding from twelve o’clock of the noon on that day on which the insurance shall be effected, until twelve o’clock of the noon of the first day of January then next following.

“No. 1. Offices, Quay Parade, Aberayron, March, 1869.

“This is to certify that Mr. Daniel Davies, as ship’s husband for the *Hermione*, 162 tons, A 1, Red, whereof is master at the present time Daniel Davies, has this day paid £17 10s. for the insurance of fifty-two shares, £1,000, on the said vessel.

570] “Value of whole ship as per rule for this class, £7 10s. per ton, £1,215.”

The policy was signed by the chairman and two other directors, the secretary and treasurer.

4. In January, 1870, the vessel was on a foreign voyage under the command of Daniel Davies, and the plaintiff, in his absence, applied for a renewal of the insurance with the defendants. The premium of £17 10s. was paid by the plaintiff, and in March, 1870, the defendants forwarded by post to the plaintiff a document similar to the one set out in paragraph 3, but dated the 24th of February, 1870, and it certified that Evan Edwards (the plaintiff), as ship's husband of the *Hermione*, had paid £17 10s. for the insurance of that vessel.

5. No copy of the rules or articles of the association was furnished to the plaintiff, and it is to be taken for the purposes of this case that he had not read and did not know of the provisions contained in them until after the loss of the vessel.

6. In March, 1870, an application was made to the plaintiff for £17 10s., being the contribution to the losses of the year 1869, payable in respect of the *Hermione*. This amount was paid by the plaintiff on the 31st of March, 1870, and a receipt for that sum was given to him (made out as received from him as ship's husband of the *Hermione*) by the treasurer of the defendants' society.

7. In October, 1870, a further call of £17 10s. was made on the plaintiff for the losses of the year 1870, and he paid the amount and obtained a similar receipt for the same.

8. On the 14th of May, 1870, D. Davies, by bill of sale, which was soon afterwards registered, transferred the *Hermione* to the plaintiff; no notice of this transfer was given to the defendants.

9. In June, 1870, D. Davies made a claim on the society for the amount of the loss of an anchor and chain of the *Hermione*. The claim was for £200, and was resisted by the society on the ground that the loss was one which should be contributed for in general average, and that the ship's proportion was only £7. A copy of the rules was then furnished to D. Davies by the defendants' secretary, and the sum of £7 was ultimately received by the plaintiff in payment of the claim.

*10. The *Hermione* was wrecked and became a total [571 loss off Pernambuco in November, 1870.

11. On the 2d of December, 1870, the plaintiff sent in to the defendants a claim for the amount of the insurance of the *Hermione*, viz., £1,000; and soon after D. Davies was requested to attend a meeting of the board of directors on the 6th of January, 1871; he attended accordingly, and was questioned as to the circumstances of the loss of the vessel.

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The directors expressed to Davies their opinion that his account of the wreck was not satisfactory, and that the loss was not shown to have been caused by perils of the seas. When he had withdrawn from the room they came to the resolution "that the owners of the *Hermione* had no claim upon the society."

12. The plaintiff had no notice of the meeting, and neither Davies nor the plaintiff had notice of this resolution, or was required to attend the directors on any subsequent occasion.

13. On the 6th of April, 1871, a notice signed by ten members, but not signed by the plaintiff or Davies, was sent to the defendants' office. This notice was submitted to the next quarterly meeting of the directors; no notice to attend was given either to the plaintiff or Davies, and the directors, in their absence, and without further inquiry, came to the same resolution as before, "that the owners of the *Hermione* had no claim on the society."

14. The defendants now admit the total loss of the vessel by perils of the seas; but contend that they are not liable in this action on several grounds, amongst others, upon the ground that the document upon which the plaintiff brings this action does not specify the risk, and is therefore void as a policy of insurance, under 30 & 31 Vict. c. 23, ss. 7, 9⁽¹⁾.

572] *15. They also contend that the rules and articles of association are to be treated as incorporated with the policy, and that under the rules the plaintiff is not a member of the defendants' society, and is not entitled to recover in respect of any loss.

(1) 30 & 31 Vict. c. 23, s. 7: "No contract or agreement for sea insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Act, 1862) shall be valid unless the same is expressed in a policy; and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes."

Sect. 9: "No policy shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or in equity, unless duly stamped; and it shall not be lawful for

the said commissioners or any officer of inland revenue to stamp any policy at any time after it is signed or underwritten by any person, on any pretence whatever, except in the two cases following: 1st. Any policy of mutual insurance having a stamp or stamps impressed thereon, may, if required, be stamped with an additional stamp or stamps, provided that at the time such additional stamp or stamps shall be required the policy shall not have been signed or underwritten to an amount exceeding the sum or sums which the stamp or stamps previously impressed thereon will warrant. 2d. Any policy made abroad and chargeable with duty by virtue of 28 & 29 Vict. c. 96, s. 15, may be stamped within the time specified in that act."

There was no evidence to show that persons insuring with the society were always required to sign the articles of association, and neither Davies nor the plaintiff had been requested to do so, either before or after the registration of the society.

16. The defendants also contend that the resolutions come to by the directors are a decision upon the plaintiff's claim, and that not having been appealed from in the manner pointed out by rule 84, the decision has become final and binding.

18. It is agreed that the court shall have power to draw all such inferences of fact as should have been drawn by a jury.

19. It is agreed that the court shall have power to make all such amendments as may be made under the Common Law Procedure Acts, and to amend the particulars if the court shall think fit, so as to enable the plaintiff to recover all or any of the money paid by him to the defendants.

The question is whether or not the plaintiff has any cause of action against the defendants.

1875. Jan. 19. *Kenelm Digby*, for the plaintiff.

R. T. Williams, for the defendants.

The questions raised in the Court of Queen's Bench, and the arguments, sufficiently appear from the judgment of the court.

In addition to the cases referred to in the judgments of the Court of Queen's Bench and the Exchequer Chamber, the following were cited: *Thompson v. Charnock* (1), *Braunstein v. Accidental Death Insurance Co.* (2).

*BLACKBURN, J.: I am of opinion that upon the [573 main point our judgment should be for the defendants, and that a nonsuit should be entered.

Four points have been discussed. The first is that the policy does not specify the risk or adventure, as required by the provisions of 30 & 31 Vict. c. 23, ss. 7 and 9, and is therefore void. The policy on its face clearly expresses that it is a marine insurance, and that the insurance shall be valid from 12 o'clock on the noon of that day in which the insurance shall be effected, until 12 o'clock of the noon of the 1st day of January then next following. It is a time policy, and though the perils insured against are not stated with particularity, it does specify the risk or adventure.

The second point is that the plaintiff is not a member of the defendants' society, and cannot recover. In support of

(1) 8 T. R., 139.

(2) 1 B. & S., 782; 31 L. J. (Q.B.), 17.

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this contention articles 3 and 4 are relied upon. The defendants' society is a mutual insurance society, and is formed into a limited company for that purpose, and the policy given to the plaintiff refers to the articles of association, which are incorporated as part of the contract of insurance. By article 3 every person shall be deemed to have agreed to become a member who insures any ship or share in a ship, and by article 4 no person shall become a member of the company until his admittance shall have been consented to by the directors, and he shall have signed a copy of the articles. Now it appears that the plaintiff had an equitable interest in the *Hermione*—he was the equitable owner of the ship, but his name did not appear on the ship's register as the legal owner. Davies, acting as ship's husband, first insured the *Hermione* for £1,000 with the defendants. The defendants accepted the insurance and received the premium; one or two years went by, during which the defendants made calls upon the plaintiff as owner of the *Hermione*, and a member of the society; but when the ship is lost, the defendants refuse to pay the insurance, and it is contended that the plaintiff, who caused his interest in the ship to be insured, cannot recover for the loss as a member of the defendants' society, on the ground that he never, in fact, signed a copy of the articles. The answer is obvious; that as the directors choose to accept an insurance on the 574] *Hermione*, and thereby made the owner a member *of the society, and treated him as such, and made calls on him as such, they are precluded from saying that he is not a member of the society because he has not signed a copy of the articles. They have dispensed with the necessity of the plaintiff signing a copy of the articles, for they have treated him and dealt with him as if he had signed.

With regard to the third point. Davies was the registered owner of the *Hermione*, and after the insurance had been made he conveyed the legal interest in the ship to the plaintiff, whose equitable interest then became a legal interest. Article 63 provides in effect that, when a member of the society sells a vessel which is insured by the society, he shall not sell the policy with it, and the purchaser is not entitled to recover or to be indemnified for any loss which may have happened after the sale. It is said, that, inasmuch as the legal owner, Davies, had transferred the legal interest in the ship to the plaintiff, who had the equitable interest, the transfer was the sale of a vessel by a member of the society. But that is not so. The fact that the plaintiff turned his equitable interest in the ship into a legal

interest, does not bring this case within the purview of article 63. It is neither within the spirit nor the words of that clause. On these three points we give our judgment for the plaintiff.

As to the last point, which is the main contention in the case, our judgment must be for the defendants. The document issued by the defendants does not expressly state what perils they undertake to insure against. It certifies that Edwards, as ship's husband for the *Hermione*, has paid a sum of money for the insurance on the vessel. It refers to the articles of association; it regulates the times at which at certain seasons of the year vessels shall sail for certain specified ports; it contains provisions, if at particular times the vessel meets with an average loss, what deductions shall be made; and it states that every insurance effected shall be valid and binding from twelve o'clock of the noon on the day on which the insurance is effected, until twelve o'clock of the noon on the first of January then next following. The whole document points to this: that the parties are entering into a contract of indemnity—an insurance against marine perils during a period from the date of the policy to the 1st of January in the *following year. Nothing, [575 however, is expressly stated as to what perils the plaintiff was to be insured against, but I have no doubt that it was intended that the plaintiff should be indemnified against loss from the ordinary underwriters' perils. Neither have the defendants anywhere in express terms stated that they will pay any money; it is to be implied, from the fact of their having in effect entered into a policy of marine insurance, that there is to be an indemnity. Then we are to look at the articles of association to ascertain how the indemnity is to be settled and paid by the defendants to the members of the society. This is provided for by article 39, which confers full power on the directors to adjust, settle, and decide all claims and demands upon the society by the members thereof. So far it is clear that the indemnity is to be settled by the directors, who are to be the arbitrators. And then it provides that no member of the society shall be allowed to bring or have any action . . . for any claims or demands upon or in respect of the society or the members thereof, except as is provided by these presents. Now, what did the parties mean by this article? It has been decided by numerous cases, all of which are referred to in *Scott v. Avery* (¹), that where a person has entered into an agreement, a breach of which would give him a cause of ac-

(¹) 5 H. L. C., 811; 25 L. J. (Ex.), 303.

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tion in a court of law, and the same document contains a clause that all disputes arising between the parties shall be referred to the arbitration of a particular person, such a stipulation is not a bar to an action, or, as it has been phrased, does not oust the courts of their jurisdiction; but it has been decided in the case of *Scott v. Avery* (¹), that where parties have entered into a contract of indemnity, they may, if they choose, agree that in the event of any loss occurring, such loss shall be ascertained by any arbitrator that they may select, and they may agree to pay such loss when it has been ascertained, and not otherwise. That is as I understand the principle of *Scott v. Avery* (¹). This principle has been acted on in several cases, in which sometimes it has been held that ascertaining the loss is a condition precedent to bringing an action for the amount, and sometimes not. In the present case we have a mutual insurance club; all the members mutually agree to insure the vessels 576] of each other. It is by no means improbable that they should say: In doing this we do not intend that we, who are members of the same club shall litigate with each other: what we do intend is, that the directors of the society shall decide finally what the loss incurred by any one member may be, and we shall pay upon the decision of the directors. And then article 84 provides that if any member is dissatisfied with the decision of the directors, and he can get ten members to agree with him, the directors will have to reconsider their decision; and if he is still dissatisfied with the second decision, he may, together with twenty members, summon a special general meeting of the society to reconsider the directors' decision. Now, assuming that to be the intention of the parties, and considering the words that they have used, it does seem to me that the members who have entered into the society have agreed that the indemnity to be paid shall be determined in that particular mode—it shall be determined by the directors, subject to those two appeals; and the promise of the defendants is to pay an indemnity which has been determined in that way, and not otherwise. We must not expect, in construing these articles, to find a case expressly in point, but I think *Tredwen v. Holman* (²) comes as near as possible to this case, and I have come to a similar conclusion to that of the Court of Exchequer, viz., that the parties have agreed that the members shall be indemnified by recovering such sum as the directors, subject to the appeals given by the rules, decide that the society ought to pay.

(¹) 5 H. L. C., 811; 25 L. J. (Ex.), 308. (²) 1 H. & C., 72; 31 L. J. (Ex.), 398.

MELLOR, J.: I am of the same opinion. I agree that the first three points must be answered in favor of the plaintiff. But with regard to the main point, I think the case falls within the rule laid down in *Tredwen v. Holman* (*). I think it is quite competent for the society to establish a domestic forum that shall decide all disputes which shall arise between the members, and that they shall not resort to a court of law until they have proceeded according to the rules to which they are all parties. No doubt the language in rules 83 and 84 is somewhat obscure, but on the whole I think the defendants have made a provision by which the plaintiff is prevented from suing in the present action.

*LUSH, J.: I am of the same opinion. I agree [577 with the judgment of my Brothers Blackburn and Mellor upon the first three points that have been made. As to the objection that the plaintiff was not a member of the company, I think, although he had never signed the articles, the defendants have so dealt with him as to estop themselves from saying that he was not a member entitled to the rights of a member and subject to the liabilities of a member. The substantial question is, what is the nature of the contract which is expressed in the policy, is it a conditional or an absolute contract? I have come to the conclusion that it is not an absolute contract, but conditional, and the conditions are to be ascertained by reference to the articles of association. The policy professes to have been issued by a mutual ship insurance society limited—a society, therefore, which is governed by articles of association, and the articles of association are twice referred to in the body of the document which is the policy. The part that contains the contract is in these terms: “This is to certify that Mr. Evan Edwards, as ship’s husband for the *Hermione*, 162 tons, A 1, Red, whereof is master at the present time Daniel Davies, has this day paid £17 10s. for the insurance of fifty-two shares, £1,000, in the said vessel.” That is all. How the loss, when a claim has been made, is to be ascertained, what amount is to be ultimately paid by way of indemnity, or when the payment is to be made, are all left to be inferred from the articles of association. There is no express contract on the face of the policy; it is only a certificate that the plaintiff was insured for a given amount. We have to refer to the articles of association to learn in what way the parties intended that the amount of loss should be determined and payment made. Then, upon looking at articles 83 and 84, I have no doubt whatever

(*) 1 H. & C. 72; 31 L. J. (Ex.), 398.

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that the contract was a qualified one; it is: "We hold your vessel to be insured subject to the terms expressed in the articles of association;" and those terms are that in case of loss, or a claim for loss, the whole matter is to be investigated by the directors, the amount payable, if any, is to be ascertained by them, and their decision is to be final, subject only to the right of appeal which has been already adverted to. This being so, the case is clearly 578] within **Scott v. Avery* (¹), and the plaintiff cannot maintain an action in this court in express variance with the terms upon which he accepted the policy from the directors.

Judgment for the defendants.

On error by the plaintiff to the Exchequer Chamber,
1875. May 10, 11. *Cohen*, Q.C. (*Kenelm Digby* with him), for the plaintiff.

W. Williams, Q. C. (*B. T. Williams* with him), for the defendants.

Cur. adv. vult.

1876. Feb. 26. The following judgments were delivered:

AMPHLETT, B.: The facts are sufficiently stated in the case and exhibits.

Two points were relied upon in the argument before us on behalf of the defendants: 1. That the plaintiff was insured, if at all, upon the terms of the articles; 2. That under articles 39, and 83 and 84, it was made a condition precedent to his right to bring an action that the amount of his claim should be determined by the directors.

On the first point, in my judgment, the defendants are right. The plaintiff knew that he was dealing with a registered society, and the articles are referred to in the contract signed by the directors in a manner which, I think, clearly shows that both parties intended to contract on the footing of the articles. In fact, unless the articles are considered (as I think they ought to be) incorporated, the contract would be altogether invalid for (among other reasons) the omission therein of any enumeration of the perils insured against.

On the second point, I think that, upon the true construction of the articles, it must be taken to have been the intention of the parties to give exclusive jurisdiction to the directors to settle all claims between the society and its members, and the question whether an agreement to that effect is void as being against the policy of the law is, in my

(¹) 5 H. L. C., 811; 25 L. J. (Ex.), 308.

judgment, concluded by the decision *of the House [579 of Lords in *Scott v. Avery* ('). It is true that in the present case the directors are to decide not the mere amount of the claims, but also any dispute that might arise respecting insurances, but so they were in *Scott v. Avery* ('), and both the learned Lords who decided that case held such extension of the powers of the directors to be immaterial.

Under these circumstances it is not necessary to consider at length the subsequent decisions of inferior courts. I may, however, refer to *Tredwen v. Holman* ('); *Elliott v. Royal Exchange Assurance Co.* ('); *Dawson v. Fitzgerald* ('); the first of which is, in my judgment, undistinguishable from the present case.

I think, therefore, that this action cannot be maintained, unless it can be shown that the conduct of the directors, in the so-called arbitration, has made it inequitable to compel the plaintiff to submit his claim to their determination. Hence the conduct of the directors in this respect has become very material, and requires a minute examination. The facts are to be found in paragraphs 11, 12, and 13, of the case, which are as follows:

[The judgment then set out those paragraphs.]

In my opinion, these proceedings of the directors were unjustifiable, and can only be accounted for, consistently with honesty and good faith, by supposing that they had mistaken their real position, and supposed that, being agents of the society, they had no duty to perform towards the plaintiff.

It is beyond doubt, however, that when they undertook the delicate task of adjudicating between their own society and a member, their functions, if not strictly the same, were analogous to those of an arbitrator, and they were bound to act judicially and with perfect fairness and impartiality between the parties: *McIntosh v. Great Western Ry. Co.* ('). To come to a decision under these circumstances in favor of their own society, and against the plaintiff, without hearing him or giving him an opportunity of being heard, was contrary to every principle of justice, and ought not, I think, to be held, by any court of law or equity, to be binding upon him.

*Moreover, I think that it would be unreasonable [580 to compel the plaintiff now to submit his claims again to the directors, they having already prejudged the case in his ab-

(1) 5 H. L. C., 811; 25 L. J. (Ex.), 308.

(2) 1 H. & C., 72; 31 L. J. (Ex.), 398.

(3) Law Rep., 2 Ex., 237.

(4) Law Rep., 9 Ex. 7; reversed on appeal, 1 Ex. D., 257.

(5) 2 De G. & Sm., 758, 769.

sence. It is hardly likely that, after what has occurred, the directors could now approach the subject with that even and unbiassed mind which is, as the Vice-Chancellor said in *Kemp v. Rose* (1), essential to the validity of every judicial proceeding.

If the matter had rested only on the first meeting of the directors on the 6th of January, 1871, it might have been suggested that the directors, having had no notice of the transfer of the vessel to the plaintiff, considered Davies as the owner; and thought it sufficient to have him before them; but it did not rest there, for no notice of that resolution was ever given either to Davies or to the plaintiff, nor was any notice given to either of them of the subsequent quarterly meeting to which the notice signed by ten members was submitted, and at which the same resolution was confirmed in the absence of both. I infer from these facts that the attendance of Davies, who, as I said before, was master of the lost vessel, was requested as a witness and not as the supposed owner, and his presence, therefore, at the first meeting does not alter the view I have taken of the directors' conduct in the matter.

But it is said that the determination of the directors having been made a condition precedent to bringing an action, a court, at law at least, cannot interfere, as that would be making a new contract for the parties. I think there is a fallacy in this argument. Courts of equity have no more power to make new contracts for parties than courts of law, and yet they would undoubtedly interfere when a contract is performed on one side and the mode agreed upon for ascertaining the amount to be paid by the other has failed in any way without the plaintiff's fault. Put the simple case, which is in principle the same as that we are considering: A. contracts to do work for B., the price to be determined by the engineer of B. The work is done, and before the price is determined the engineer, by some act of his own not necessarily fraudulent, becomes incapacitated to act as arbitrator. I cannot persuade myself that [581] courts of law are powerless to prevent the gross injustice of B. having the benefit of the work, without compensation to A., except by the inconvenient and often ineffectual course of bringing an action for neglect of duty against the engineer and his employer. To give direct redress in such a case seems to me only another application of the well-known principle, that a man shall not take advantage of his own wrong, under which even precedent conditions, in

(1) 1 Giff., 258, 264.

their strictest sense, have been held to be discharged where performance was prevented by the defendant himself: see Comyns' Digest, Condition (L. 6); and the case of *Hotham v. East India Company* ⁽¹⁾. Courts of equity have concurrent jurisdiction, even in respect of legal claims, with courts of law in cases of fraud, and they appear to have assumed jurisdiction in the sort of cases we are considering, on the ground that where the acts of the defendants which prevented the amount of the plaintiff's claims being ascertained in the agreed mode were not in themselves fraudulent, yet they would become fraudulent if used for the purpose of defeating the plaintiff's rights: see *McIntosh v. Great Western Ry. Co.* ⁽²⁾. It most frequently happens that the circumstances of these cases are complicated, and can be more conveniently investigated in a court of equity than in a court of law; but in a case like the present, where a court of law can do complete justice by simply disallowing a defence founded on the failure of the agreed arbitration, here the act of the directors, the convenience is quite the other way; and I can see no reason why a court of law should not determine the matter themselves.

For these reasons I think that the plaintiff can sustain his action; and there is no difficulty about the amount, as it is found in the case (paragraph 14) that the defendants now admit, contrary to what their directors had determined, a total loss of the vessel by perils of the sea.

The decision of the court below is, therefore, in my opinion, erroneous and ought to be reversed; and judgment entered for the plaintiff for £1,000, with interest and costs of suit.

POLLOCK, B.: This action is brought by the plaintiff as owner of a vessel called the *Hermione* against the defendants, who are a *limited company for the mutual [582 insurance of ships, to recover upon an insurance effected with the defendants, whereby the *Hermione* was insured from the 24th of February, 1870, to noon of the 1st of January following.

The defendants admit that the *Hermione* was insured, and also that there was a total loss; but they contend that the plaintiff can maintain no action against the company until he has complied with the company's articles which relate to the adjustment and settlement of losses. The plaintiff alleges that the document by which the insurance

⁽¹⁾ 1 T. R., 638.

⁽²⁾ 2 De G. & Sm., 758; and on appeal, 2 Mac. & G., 74, 95; 19 L. J. (Ch.), 374.

condition precedent to any right to payment arising. There is no more displacement of a cause of action or ousting of jurisdiction than there is when parties agree that a builder shall be paid such a sum as an architect shall name; and the case comes within the principle acted on in *Scott v. Avery* (*), *Tredwen v. Holman* (*), and *Elliott v. Royal Exchange Assurance Co.* (*), and not within that by which the court was governed in *Horton v. Sayer* (*). The distinction between the cases is well pointed out by Bramwell, B., in *Tredwen v. Holman* (*), where he says: "If a tenant covenants that he will cultivate the demised land in a husband-like manner, and also covenants that if any dispute shall arise in respect thereof, it shall be referred to arbitration, an action may nevertheless be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until he has ascertained them." And, again, in similar language, in *Dawson v. Fitzgerald* (*).

Before leaving this part of the subject I must not omit, however, to notice the construction of article 39, that was pressed upon us by Mr. Cohen as counsel for the plaintiff. 585] The article *provides that "no member shall be allowed to bring any action, suit, or proceeding, or other remedy against the society, or the members thereof, for any claims or demands upon or in respect of the society, or the members thereof, except as is provided by these presents." He argued that these latter words were intended to preclude a member from bringing any action against the society, even where his loss has been adjusted by the directors, and they declined to pay.

It appears to me, although the language used is not very clear or accurate, that the intention of the parties is limited to requiring that members having claims on the society shall proceed according to the mode of proof pointed out by the articles, and that if all conditions precedent were fulfilled, and the decisions of the directors was obtained in favor of the claimant for a specific amount, an action would well lie against the society if they refused to pay it.

I have hitherto dealt with the question apart from the Stamp Act, 30 & 31 Vict. c. 23. Sect. 7 of this act provides that "no contract or agreement for sea insurance shall be valid unless the same is expressed in a policy; and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or

(*) 5 H. L. C., 811; 25 L. J. (Ex.), 308.

(*) 1 H. & C., 72; 31 L. J. (Ex.), 398.

(*) Law Rep., 2 Ex., 237.

(*) 4 H. & N., 643; 29 L. J. (Ex.), 28.

(*) 1 H. & C., at p. 79.

(*) Law Rep., 9 Ex., at p. 10.

sums insured;" and by s. 4 the word "policy" is declared to mean "any instrument whereby a contract or agreement for any sea insurance is made or entered into."

The object of this enactment is to prevent persons obtaining the benefit of a marine insurance without paying stamp duty. It clearly does not make any particular form of policy compulsory; else it would have referred to as essential the form mentioned in s. 5 and schedule E, which the Commissioners of Inland Revenue are thereby bound to provide, nor does it forbid companies or underwriters importing into their stamped policies, by reference or otherwise, terms which are not expressed in them: provided the risk and other matters mentioned in s. 7 are contained in a stamped policy. It seems to me, therefore, that the document dated the 24th of February, 1870, satisfies the requirements of and is sufficient as a policy within the Stamp Act, although terms exist relating to the adjustment and settlement of any loss that may arise under it which are [586 not contained in it, and yet are binding on the plaintiff.

To apply to this case the well-known principle acted on in *Boydell v. Drummond* (1) would be, I think, unnecessary and unreasonable, for there is no such reason for the exclusion of parol evidence to connect the various documents which are intended together to constitute the contract or policy of insurance as there is in the case of contracts within the Statute of Frauds.

Although, therefore, the inartificial manner in which the policy and rules are drawn creates some difficulty, I find it satisfactory to arrive at a conclusion which supports what was the substance of the transaction, and prevents the plaintiff setting up a contract which it is obvious he could not himself have contemplated, and which certainly could never have been intended by the defendants, as it would have been a departure from the fundamental principles and the daily practice of the company.

For these reasons the judgment of the Queen's Bench should, in my opinion, be affirmed.

My Brother Archibald agrees in this judgment.

BRETT, J.: This was an action to recover for a total loss on the vessel *Hermione*.

[The judgment then stated the facts, and the contentions of the defendants, as set out in the case.]

Upon the argument before us, it was contended, on behalf of the plaintiff, that there was a valid contract of insurance; that the contract was to be found solely in the document of

(1) 11 East, 142.

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March, 1869; that such document did not incorporate the articles and rules of the association; that, whether it did or not, the plaintiff's right to maintain the action was not abrogated; for that rule 39 was no answer to the action, being an attempt to set up a private tribunal to try a right of action accrued; and that no such decision by the directors or the meeting as was relied upon could affect the plaintiff, who had not been summoned or heard when it was arrived at. It was admitted, on behalf of the defendants, that there was a contract of insurance contained in a valid policy; and that there was a total loss; and that the plaintiff was a member 587] of the association; *but it was argued that the policy consisted, not only of the document of March, 1869, which, if it stood alone, was no policy at all, because in it the risk was not sufficiently specified, but of that document and the articles and rules; that by the rules the plaintiff was bound to submit his claim to the decision of the directors, subject to an appeal to a quarterly and a general meeting; that no right of action accrued to any member in respect of a loss, unless he could obtain from the directors or the association a decision in his favor, that his claim was valid and to a certain amount; that the plaintiff had not obtained such a decision; that the adverse decisions of the directors and the quarterly meeting were final; and that the plaintiff therefore never had a cause of action against the defendants. Several points argued in the court of Queen's Bench were not argued before us.

The questions before us are, first, is the document of March, 1869, to stand alone as the policy, or are it and the articles and rules, or some of them, to be read together, and so to form a policy in writing? Secondly, if the document of March, 1869, is to stand alone, is it a valid policy in writing? Thirdly, do the rules, if they are to be considered as no part of the policy, prevent the plaintiff from maintaining this action? Fourthly, do they prevent the plaintiff from maintaining the action if they are to be considered as part of the policy?

As to the first question, it was argued that there is no contract of insurance here, unless it be formed by the document of March, 1869; that such document contains no reference to the rules, which are said to prevent the plaintiff from maintaining the action, and therefore does not incorporate them. And the case of *Boydell v. Drummond* (1) was cited. That case was decided on the Statute of Frauds. The ground of decision was, that separate documents in

(1) 11 East, 142.

writing could not be joined together to make a memorandum in writing within that statute, unless there was a sufficient reference from one writing to another contained in the documents themselves to show that they were intended to be jointly the memorandum, without being obliged to have recourse to parol evidence to show such intention; for otherwise the danger from parol evidence would arise, which it was the intention of the statute to *obviate. That [588 ground of decision is applicable only when the question is, whether there is or is not a sufficient memorandum within the Statute of Frauds. It does not seem to me to be applicable to a question, whether there is a sufficient policy of assurance in writing, or as to what documents form that policy. I see no reason why parol evidence should not be admitted to show what documents were intended by the parties to form an alleged contract of insurance. It seems to me in the present case obvious, as an inference of fact from the whole relation between the parties (and we have power to draw inferences of fact), that the intention was that the contract of insurance should be found not alone in the document of March, 1869, but in it and such of the rules as are applicable to a contract of insurance.

Such being my opinion, it is unnecessary to determine the second question. Still my opinion is that there is nothing in the Stamp Act to prevent the document of March, 1869, from being considered as a valid policy. I agree with the interpretation of the Stamp Act contained in the judgment of Blackburn, J., in this case in the Queen's Bench. Neither is it necessary to determine the third question. Though here again I should think it plain that if the articles and rules are a separate contract from the policy, no agreement in them, however strong and absolute not to sue, could prevent the plaintiff from maintaining an action on the separate policy or contract of insurance.

The fourth is therefore the main question in this case. It seems to me to raise these points: What is the contract as to payment in case of loss? What is the stipulation as to the assured suing in a court of law or equity? What is the limit of the rule of law established by the case of *Scott v. Avery* (¹),—does it prevent the maintenance of the present action? Now as to the first, there is no express stipulation as to any payment being due in case of loss in the document of March, 1869. Neither is there any in the articles of association. Those articles contain rules for the management of the society and rules as to the making of contracts of

(¹) 5 H. L. C., 811; 25 L. J. (Ex.), 308.

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insurance, and rules which, as I have said, form, in my opinion, parts of the contract of insurance. With the rules which deal solely with the management of the society 589] we are not concerned. *Those which are applicable to the making of contracts of insurance, are rule 28, which primarily gives the power of making such contracts to the directors; rule 40, which gives authority to the directors to delegate the power of signing policies to two directors and the chairman, and enacts that no policy but one so signed shall be binding on the society; and rule 53, which adds further restrictions. These rules show that there would be no valid insurance in this case without the document of March, 1869; but do not, in my opinion, prevent the incorporation into or adjunction to that document, as part of the contract, of such rules as are applicable to the contract. Rules which thus form part of the contract are, amongst others, rule 61, which shows that the society insures, not only against total loss, but also against partial loss or damage if to a certain amount; and rule 83, which, by a necessary implication, discloses the perils insured against, including loss or damage by collision. I do not doubt that rules 39 and 84 are also included in the contract, and form part of the policy. What, in my opinion, is the true construction of them, I will presently state. But for the present I observe that neither of them contains any express undertaking to pay in case of loss, or to pay at any specified time. There is no rule which has any express stipulation to pay anything in case of loss. But then there never is any such express stipulation in any policy of marine insurance in ordinary form. A Lloyd's policy contains no such express stipulation. It has always been implied that a liability to indemnify arises directly there is a loss or damage by a peril insured against, unless such liability is prevented by some stipulation or condition expressed or implied in the policy. In the policy, therefore, in this case, it is to be implied that such liability to indemnify arises directly a loss or damage is caused by a peril insured against, unless the true construction of rule 39 is that it postpones the attaching of liability to a later time, or makes it depend upon another event than a loss or damage caused by a peril insured against. The first rule applicable to events in order of time after an alleged loss or damage is rule 83. "In all cases of any vessel, &c., being lost, &c., the owner, master, or mate, or some of the crew, shall, as soon as circumstances will permit, give notice thereof to the secretary, &c.; and the 590] directors shall proceed to examine *the owner, master

and mate, and such of the crew as they shall think necessary, *as to the cause of such loss or damage*, and shall make such further inquiries and take such measures and make such decisions and regulations thereon as in their judgment the case shall require." There is to be inquiry and decision, not merely as to the amount of loss or damage, but as to the cause of loss or damage. This seems to me to assume to give power to decide whether the loss was or was not caused by a peril insured against, so as to decide whether the society is or is not liable for the loss or damage in respect of which a claim was made. By rule 84, "If any member shall be dissatisfied with the *decision of the directors*," amongst other things, "*as to any claim or other matter decided by the directors*," he may appeal to a special general meeting. And by rule 39, the directors shall have full power, amongst other things, "*to decide and determine all disputes, controversies, and matters arising between the society and members of the society concerning insurances or claims upon or liabilities by the society*." These confirm and strengthen the view that it was intended that the directors should decide and determine, not only the amount for which the society should be liable, if a liability could be proved, but the question whether there was or was not any liability. And it was upon the latter view that the directors in the present case assumed to decide and determine that the society was not liable to the plaintiff. The next question is, what is the effect endeavored to be given by the rules to the decision of the directors or of the general meeting of the society? By rule 39, "and the decision of the directors shall be final and conclusive, as well upon the society as the members thereof." That is to say, a decision as to whether the society is or is not liable at all is to be final and conclusive. Then the rule continues: "And no member of the society shall be allowed to bring or have any action, suit, or proceeding, or other remedy against the society, or the members thereof, for any claims or demands upon or in respect of the society or the members thereof, except as is provided by these presents." The rule then provides that the directors may, if they think fit, cause "*any of such claims*," i.e., any claim upon the society concerning insurance, i.e., the whole claim, "to be referred to the decision of any person practising as an average *adjuster." The [591 powers given to this person are clearly to be exercised judicially, as if by a tribunal. "And the decision or award of such average adjuster shall be final and conclusive on the society and claimant; and no appeal shall be allowed there-

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from." And so by rule 84, "Whatever shall be decided by the special general meeting shall be final and binding, as well upon the society as upon all the parties interested in the decision." These inquiries and decisions are not confined to the question of amount, contingent on a liability being admitted or established. They may, so far as I can see, take place where the amount is not in dispute, if a liability be established, but also where the liability is disputed. The terms are certainly wide enough to include every question which may arise upon any claim by a member for any alleged loss under a policy. They assume a claim in respect of any alleged right, a dispute as to the validity of such claim, an inquiry into such dispute, and a decision which shall be final and conclusive. If the decision ought to be arrived at after hearing evidence and the parties, it is a judicial decision. If so, it seems difficult, if not impossible, to say that there is not an attempt and intention to form a private tribunal, which is to replace the ordinary tribunals of the country. The stipulations as to the procedure before the average adjuster show that those who drew the rules intended that there should in all the inquiries be a judicial investigation before a tribunal; which is therefore a judicial tribunal. These rules do not seem to me to confine the inquiry and decision of which they treat to the amount to be paid, leaving the liability to pay to be established before the ordinary courts, or merely to postpone the liability to pay until the amount to be paid has been determined by the directors or an arbitrator: they do not affect the time of payment in respect of a loss; they do not therefore alter the implied contract to indemnify directly a loss arises; they leave that contract to be independent; they deal no more with that than with any other stipulation in the contract of insurance; but they are, as it seems to me, intended to create a tribunal to hear and determine every question which may arise in respect of a policy made with the society, and to determine everything finally and compulsorily, so as to prevent any application to the ordinary courts.

592] *Then arises the question what is the law? I agree with Martin, B., in *Horton v. Sayer* (¹), that if the decision in *Scott v. Avery* (²), in the House of Lords, is to be interpreted according to the opinion expressed therein of Lord Campbell, the former cases are overruled, and the doctrine previously maintained with regard to ousting the jurisdiction of the ordinary courts is exploded. But I do not think

(¹) 4 H. & N., at p. 650; 29 L. J. (Ex.), at p. 82.

(²) 5 H. L. C., 811; 25 L. J. (Ex.), 308.

it is possible to say, that the decision of the House of Lords did overrule the former decisions. Baron Martin thought it did. He so stated in *Horton v. Sayer* (¹), and so in terms ruled in *Tredwen v. Holman* (²). The facts in *Scott v. Avery* (³), as interpreted, did not make it necessary to decide more than this, that there may be a valid and binding contract that no action shall be maintained until the amount of damage, if any, has been ascertained in a specified mode. "It appears to me perfectly clear," said the Lord Chancellor, "that the language used indicates this to have been the intention of the parties, that, supposing there was a difference between the person who had suffered loss or damage and the committee *as to what amount* he should recover, that was to be ascertained in a particular mode, and that until that mode had been adopted, and the amount ascertained according to that mode, no right of action should exist. In other words, that the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say." This ruling, as it seems to me, in no way conflicts with a right in either party to litigate before a court of law or equity any other question than the amount of damages which might arise under, or in respect of, the contract. The terms of the rule in that case were not the same as in this. They were, first, "that the sum to be paid to any suffering member for any loss or damage shall, *in the first instance*, be ascertained and settled by the committee." And then, "that no member, who refuses, &c., shall be entitled to maintain any action at law or suit in equity on his policy *until* the matters in dispute shall have been referred, &c., and then only for such sum as the said arbitrators shall award; and the obtaining the decision of **such* arbitrators on the matters and claims [593 in dispute is *hereby declared to be a condition precedent* to the right of any member to maintain any such action or suit." These terms seem rather to assume than to forbid the possibility of an action or suit upon questions other than the amount. "There is no dispute as to the principle," says Coleridge, J., in the Exchequer Chamber (⁴). "Both sides admit that it is not unlawful for parties to agree to impose a condition precedent with respect to the mode of settling the *amount of damage* or the *time of paying it*, or any matters of that kind, *which do not go to the*

(¹) 4 H. & N., at p. 650; 29 L. J. (Ex.), at p. 32.

(²) 1 H. & C., 72; 31 L. J. (Ex.), 398.

(³) 5 H. L. C., 811; 25 L. J. (Ex.), 308.

(⁴) 8 Ex., at p. 500.

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root of the action. On the other hand, it is conceded that any agreement which is to prevent the suffering party from coming into a court of law, or, in other words, which ousts the courts of their jurisdiction, cannot be supported." And, in order to form and support the judgment, the large terms in that case were by reference confined so as to be applied to a reference of the amount only, and not of the liability. In *Horton v. Sayer* (*) the stipulations in the lease were, "that if at any time during the said term, or at, or after the expiration thereof, any difference should arise touching or concerning any covenant, &c., *all and every the matters in difference* should be finally settled by arbitration. And every such award should be binding and conclusive. And that the parties should not commence or prosecute any action or suit, or seek any remedy, either in law or equity, for relief in the premises without first submitting to such arbitrator as aforesaid *all matters in difference*," &c. It is obvious that in those stipulations the arbitration was not confined to settling an amount of damages, but was general. "In this case," says Pollock, C.B., "the deed discloses nothing more than an agreement generally to refer *all disputes* to arbitration, and that does not prevent the plaintiff from maintaining this action." And Bramwell, B., says, "I think *Scott v. Avery* (*) was rightly decided, though perhaps I may have some bias in consequence of having been counsel for the plaintiff. The principle of that decision is very intelligible. If a man covenants to do a particular act, and also covenants that if any dispute shall arise in respect thereof it shall be referred to arbitration, that is 594] the case with reference to *which the courts have used the unfortunate expression that their jurisdiction is ousted by the agreement of the parties. On the other hand, if a man covenants to do a particular act, and that in the event of his not doing it the other party shall be entitled to receive such a sum of money as they shall agree upon, or if they cannot agree, such an amount as shall be determined by an arbitrator, there is no debt which he can be sued for until the arbitrator has ascertained what sum is to be paid." He then decides in favor of the plaintiff, because "there is a distinct and unqualified covenant by the defendant that he will do a particular act, and also a covenant that, if *any difference* shall arise, it shall be referred to arbitration." It is impossible, as it seems to me, to have a more clear statement that *Scott v. Avery* (*) did not overrule the former de-

(*) 4 H. & N., 643, 650, 651; 29 L. J. (Ex.), 28.

(*) 5 H. L. C., 811; 25 L. J. (Ex.), 308.
(*) 5 H. L. C., 811.

cisions. And the case is an authority that the distinction is between an agreement to refer a particular point as a condition precedent to an action, and to refer all matters in dispute so as to leave no action.

In *Roper v. Lendon* ⁽¹⁾ the tenth condition in a fire policy was: "the amount of every loss will be paid immediately after the same shall have been established to the satisfaction of the directors." The fifteenth condition was: "In case *any difference or dispute* shall arise between the insured and the company touching any loss, &c., or otherwise in respect of any insurance, such difference shall be submitted, &c., and the award shall be conclusive and binding on all parties." The sixth plea relied on the fifteenth condition. Mr. Lush, arguing for the defendants, admitted that the sixth plea was bad. This of itself is high authority. Lord Campbell, giving judgment, said: "The sixth plea is clearly bad. The agreement to refer, contained in the fifteenth condition, is merely collateral to the agreement to pay. The courts will not, therefore, treat the agreement to refer as ousting their jurisdiction until there has been a reference. The distinction between the present case and cases like *Scott v. Avery* ⁽²⁾ is plainly pointed out in the judgment there delivered in the House of Lords. The present case does not fall within that decision," &c. And Hill, J.: "The sixth plea is bad. The case is clearly not within the decision in *Scott v. Avery* ⁽³⁾. Here the agreement to refer is collateral *to the agreement to pay; there the [595 agreement was to pay *only such a sum as the arbitrators should award*." This seems to me a conclusive statement, by or with the assent of Lord Campbell—on whose judgment in the House of Lords reliance was placed for the proposition that the doctrine as to ousting the jurisdiction of the courts is abrogated—that *Scott v. Avery* ⁽⁴⁾ did not overrule that doctrine, that it still exists, and that the test is whether the agreement to refer applies only to the ascertaining a particular fact or to the decision of every dispute which may arise. In *Cooke v. Cooke* ⁽⁵⁾ Sir P. Wood thus discusses *Scott v. Avery* ⁽⁶⁾: "These observations of Lord St. Leonards have been commented on by the present Lord Chancellor in *Scott v. Corporation of Liverpool* ⁽⁷⁾, which fell within the principle of *Scott v. Avery* ⁽⁸⁾. A simple case, where a contractor had agreed that he should be paid only when the engineer should certify; and it was held,

⁽¹⁾ 1 E. & E., 825, 830; 28 L. J. (Q.B.), 260.

⁽²⁾ Law Rep., 4 Eq., 78, 85.

⁽³⁾ 3 De G. & J., 334, 360.

⁽⁴⁾ 5 H. L. C., 811.

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that there was no right of action until the certificate was made. But the Lord Chancellor distinguishes that simple class of cases from the other, where a distinct right, such as a debt, or an obligation to account has arisen, and the parties have agreed upon a particular private tribunal which shall adjust the right for them. Speaking of the latter class of cases, the Lord Chancellor says: 'A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals.'". But the case of *Tredwen v. Höllman* (¹) is said to be contrary to these views. The stipulation in the policy was, "and all other causes of dispute, of whatever nature, shall be referred in like manner; and no action at law shall be brought, until the arbitrators have given their decision." The court decided in favor of the defendants. Martin, B., in delivering the judgment, said: "The case of *Scott v. Avery* (²) decided that the insurer and the underwriter may contract that no right of action (to be enforced in a court of law) shall accrue until an arbitrator has decided, not merely as to the amount to be recovered, but upon any dispute that may arise upon the policy. . . . The agreement is clear and 596] *unambiguous, and the parties probably meant to act upon *Scott v. Avery* (²), and exclude the jurisdiction of the courts of law except for the purpose of enforcing the award to be made by the arbitrator." This judgment seems to me to be founded upon the view maintained by Martin, B., that the judgment in the House of Lords in *Scott v. Avery* (²), which was contrary to the opinion given by him in that case, overruled all the previous decisions on the subject. "It seems to me," he said, in *Horton v. Sayer* (³), "that *Scott v. Avery* (²) has overruled all the previous decisions on the subject." As I cannot accede to this view, I venture to say that *Tredwen v. Holman* (¹) cannot be supported. The true limitation of *Scott v. Avery* (²) seems to me to be that which was expressed in it, and which, as I have pointed out, has so often been expressed about it, that if parties to a contract agree to a stipulation in it, which imposes, as a condition precedent to the maintenance of a suit or action for a breach of it, the settling by arbitration the amount of damage, or the time of paying it, or any matters of that kind, which do not go to the root of the action, i.e., which do not prevent any action at all from being

(¹) 1 H. & C., 72, 80; 31 L. J. (Ex.), 398. (²) 4 H. & N., at p. 650; 29 L. J. (Ex.), at p. 32.

(³) 5 H. L. C., 811.

maintained, such stipulation prevents any action being maintained until the particular facts have been settled by arbitration; but a stipulation in a contract, which in terms would submit every dispute arising on the contract to arbitration, and so prevent the suffering or complaining party from maintaining any suit or action at all in respect of any breach of the contract, does not prevent an action from being maintained; it gives at most a right of action for not submitting to arbitration, and for damages, probably nominal. And the rule is founded on public policy. It in no way prevents parties from referring disputes, which have arisen, to arbitration; but it does prevent them from establishing, as it were, before they dispute, a private tribunal which may from ignorance do what the invented tribunal here did, namely, act in contravention, and insist on acting in contravention, of the most elementary principles of the administration of justice.

In this case, upon a careful consideration of such of the rules in *the articles of association as are, in my [597] opinion, parts of the written contract of insurance, I come to the conclusion that there is nothing to postpone the attaching of the implied liability to indemnify for a loss to any time subsequent to the loss, that the stipulations as to arbitration by the committee or meetings would, if carried out according to their terms, prevent the assured, under any policies of the society, from maintaining any suit or action at all in the ordinary courts of the country in respect of any dispute arising on the policy; and, therefore, that such stipulations do not prevent the plaintiff from maintaining this action.

I am consequently of opinion that the judgment of the Court of Queen's Bench should not be supported, and that judgment should be given for the plaintiff.

KELLY, C. B.: I agree in opinion with Mr. Justice Brett, and chiefly upon the grounds upon which he has delivered that opinion.

It seems to me impossible to deny that inasmuch as, by the contracts between the parties, the defendants have agreed that an insurance has been effected, and as they now admit that a total loss has been sustained, the plaintiff is entitled to recover the amount of that loss. If there be no policy, and no insurance, for what can they pretend that they have received the different premiums and the contributions of the plaintiff to losses sustained by other members? This reduces the case to the single question whether the 39th and some other articles are a bar to the action on the ground

that the decision of the directors is final and conclusive. If it be so, it can only be because the parties have contracted that there should be no remedy by action upon any claim upon any policy of insurance; and this would be not only to oust the courts of their jurisdiction to entertain an action upon a policy of insurance, but, looking to the terms of the 39th article, would be to hold that no action at all is maintainable under any circumstances by a member against the company. For we find that the directors there "have full power" (*inter alia*) "to release any contract or agreement respecting any matter in which the society may be interested, and to decide all claims and demands upon the society by the members thereof; . . . and all controversies and matters arising between the society and the members of the 598] *society concerning insurances or claims upon, or liabilities by or to the society; and the decision of the directors shall be final and conclusive; and no member of the society shall be allowed to bring any action, suit, or proceeding or other remedy against the society, or the members thereof, for any claims or demands upon or in respect of the society or the members thereof except as therein provided." And no provision is to be found qualifying this part of the article. If this provision be of legal validity, the effect would be that, had the decision been in favor of the plaintiff, that he was entitled to recover the sum insured, he could have maintained no action to enforce it.

The case of *Scott v. Avery* ⁽¹⁾ has been quoted, and undoubtedly there is much in the language of Lord Campbell in his judgment which, taken by itself, might seem to show, as Baron Martin ⁽²⁾ (I think, incorrectly,) held, that it put an end to the doctrine against the ousting of the jurisdiction of the courts.

But when we look to the facts of that case, and to the more cautious and, I think, accurate language of the Lord Chancellor, the decision may well be construed to amount to no more than that where the recovery upon a policy of insurance is made expressly dependent upon the amount of the loss having been ascertained by arbitration, or upon the performance of some other legal condition, and where other subjects of controversy are also to be submitted to arbitration, no action lies until the amount of the loss is so ascertained or the condition, upon which the action may be brought has been performed. The language also of the judges, on which ever side their opinions were pronounced,

⁽¹⁾ 5 H. L. C., 811.

⁽²⁾ In *Horton v. Sayer* (4 H. & N., at p. 650; 29 L. J. (Ex.), at p. 32).

is uniformly to the effect that the jurisdiction of the courts cannot be ousted by the contract of the parties, though the maintaining of the action may be made conditional upon the amount of loss or damage being previously ascertained, or upon some other conditions not applicable to the present case.

I must add that the resistance of the defendants to this demand appears to me so extremely unconscientious and unjust that, speaking for myself, I should not hesitate to hold, under the leave reserved for that purpose, that, if it be held that the plaintiff cannot recover upon the policy, a count for money had and received *should be intro- [599] duced, under which he may recover the amount of premium paid in respect of this policy, and possibly his contribution to the losses incurred by the society.

Here no question arose about the amount of the loss; nor was it ever required or proposed by the society, or the directors before whom the case was brought, that the amount should be referred; but they decided, at once, and without raising or suggesting any other question, that there was no loss at all by the perils of the sea.

As to the point upon the Stamp Act, it is well disposed of by my Brother Blackburn; and, indeed, appears to have been abandoned.

Judgment reversed, and entered for the plaintiff.

Solicitors for plaintiff: *Paterson, Snow & Burney.*

Solicitors for defendants: *Hayes, Twisden, Parker & Co.*

See 6 Eng. Rep., 800 note; 13 Eng. Rep., 663 note; *De Worms v. Mellier*, 13 Eng. Rep., 868; *May on Insurance*, §§ 492-496; *Patterson v. Triumph, etc.*, 64 Maine, 500; 5 *Bennett's Fire Ins. Cas.*, 622; *Roper v. Lendon*, 1 *Ellis & Ellis*, 825; 4 *Ben. Ins. Cas.*, 375; *Scott v. Phoenix, etc.*, *Stuart (Lower Can.)*, 152; 1 *Ben. Ins. Cas.*, 118, 122-130 note; 2 *Parson's Cont.* (6th ed.), 707-8; 2 *Chitty on Cont.*, (11th Am. ed.), 1183-4; *Addison on Cont.*, (6th Eng. ed.), 984, 994; *Flanders on Fire Ins.* (2d. ed.), 632.

Where a policy provided, that in case of difference arising touching any loss or damage, the matter may, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties, to the amount of such loss or damage, "but shall not decide the

liability of the company under this policy;" also, "it is furthermore hereby provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, until an award shall have been obtained fixing the amount of such claim in the manner herein above provided." Held, that whilst a mere collateral agreement to refer to arbitration all differences arising upon a policy is not binding, and does not preclude a suit without such reference, it is not unlawful for parties to agree that no action shall be sustainable at law or in equity until arbitration shall have determined what amount is due, and that in such a case a reference and ascertainment of the amount due are conditions precedent to the right of bringing the action.

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Held, also, that no suit could be sustained against the objection of the company until after an award had been made, although neither party, previous to the suit, had requested arbitration: *Yeomans v. Girard*, etc., 5 Ins. Law Jour., 858, U. S. Circuit Court, New Jersey Dist., Nixon, J.

See *Scott v. Avery*, 5 H. L. Cas., 811, 30 Eng. L. and Eq. Rep., 1, affirming Exchequer Chamber as reported, 8 Excheq., 497, 20 Eng. L. and Eq. Rep., 327; *Fox v. R. R.*, 3 Wallace, Jr., 243.

An absolute refusal to pay the insured, and without any offer to refer to arbitration, is a waiver of an arbitration clause in the policy: *Millandon v. Atlantic*, etc., 8 Louisiana, 557; 1 Ben. Ins. Cas., 497.

By a condition in a policy of insurance, in case of dispute touching the amount of the loss sustained, such dispute was to be submitted to arbitrators, one to be chosen by each party, with power to select a third in case of disagreement, their decision to be final; and no action, etc., should be maintained on the policy unless the loss, in case of such dispute, should have been first thus ascertained. Held, 1. That this did not oust the court of jurisdiction.

2. Such condition is an agreement to refer to arbitrators to be chosen at a future time, and is revocable; the party may be subject to an action for the revocation. This condition being special is not without effect, but the company,

to avail themselves of it, must show that they admitted the validity of the policy and their liability under it, and that the only question was the extent of the loss.

Where the dispute is of the character of an account involving the examination of books, the value of a large number of things, and the extent of the damage, parties may agree that it should be determined by men as appraisers: *Mentz v. Armenia*, etc., 79 Penn. St. R., 478; *Liverpool*, etc., v. *Creighton*, 51 Geo., 95; 5 *Bennett's Fire Ins. Cas.*, 573.

Where a certain person as arbitrator, appraiser, etc., has a right to decide a question, both parties must have notice of the time and place of hearing, and an opportunity to be heard. A disregard of this duty will render the award void: 1 Eng. Rep., 533 note; *Wilson v. Boor*, 40 Maryland, 483; *Ward v. McAlpine*, 25 Upper Can. Com. Pl., 119; *Brown v. Lyddy*, 11 Hun, 451.

Where, on an application for a mandamus to compel a railway company to appoint an arbitrator to determine the compensation to be paid for land taken, it appeared that the company disputed the applicant's title, and claimed title in themselves, the application was refused, and the applicant left to his action to try the title: *Matter of Jones*, 25 Upper Can. Com. Pl., 559.

[1 Queen's Bench Division, 599.]

May 23, 1876.

LEGGOTT (Administratrix of R. T. LEGGOTT) v. THE GREAT NORTHERN RAILWAY COMPANY.

Executor and Administrator—Negligence causing Death of Intestate—Administratrix suing, first, under Lord Campbell's Act, and, secondly, for damage to personal Estate—Estoppel.

Claim, stating that plaintiff was administratrix of her husband, L., who, being a season-ticket holder, was received by the defendants, a railway company, at their station to be conveyed as a passenger, and by their negligence was injured, and in consequence unable to attend to his business from that day to the day of his death, and incurred expenses, &c. Defence, first, denying specifically all allegations in the statement relating to the injury to the deceased and the damage arising from it. And, secondly, that after the death of L. the plaintiff, as his administratrix, for the benefit of herself, as his wife, and of his children, sued the defendants in respect of the injury caused to them by his death, and recovered damages. Reply, that the

defendants were estopped from denying the facts relating to the accident, as in the previous action they had pleaded, not guilty, and that L. was not received by them as a passenger, and those issues were found by the jury in the plaintiff's favor:

Held, on demurrer, first, that the second action was not barred by the judgment and satisfaction under the first; secondly, that there was no estoppel of which either party could take advantage, as the plaintiff sued in a different right in either action. *Bradshaw v. Lancashire and Yorkshire Ry. Co.* (12 Eng. Rep., 310; Law Rep., 10 C. P., 189) questioned.

CLAIM, stating that the plaintiff was the administratrix of R. T. Leggott, her husband, who died on the 3d of August, 1874. That *the defendants were carriers of passen- [600] gers between certain stations called King's Cross and Finchley, King's Cross station being occupied and managed by them. That the deceased had taken a season ticket from the defendants, entitling him to travel as a passenger on their line between the above-mentioned stations. That, on the 20th of March, 1874, the deceased was received by the defendants at their station at King's Cross as a passenger to be safely and securely conveyed by them from thence to Finchley in a train that was shortly expected to start. That, while lawfully waiting on the platform intended for passengers who wished to travel by that train, a barrow or trolley loaded with newspapers was by the negligence of the defendants violently pushed against him. That he was knocked down and seriously injured in the head and leg and otherwise. That in consequence of these injuries he was entirely unable to attend to his business from that day till the day of his death; incurred great expenses in providing other persons to manage his business, lost a large portion of the profits that he would otherwise have made, and the good-will of the business, owing to his having been unable to attend to it, was rendered much less valuable. He also incurred large expenses in obtaining the necessary medical attendance, and nursing and otherwise during his illness, and at the time of his death his personal estate and effects were much diminished in value by reason of the circumstances aforesaid. The plaintiff claimed £1,000 damages for injury to the personal estate and effects of R. T. Leggott.

Defence, 1. Denial that the deceased was received by defendants as a passenger upon the terms and for the purposes alleged in the statement of claim.

2. Denial that a barrow or trolley was by defendants' negligence violently or otherwise pushed against the deceased, or that by any negligence or default on their part the deceased was knocked down and injured, as alleged.

5. That after the death of R. T. Leggott, the plaintiff, as administratrix of his personal estate and effects for the ben-

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elf of herself, as the wife, and of the children of R. T. Leggott, sued the defendants in the Queen's Bench Division of the High Court of Justice, under the statute in such case made and provided, for that the defendants were in possession of a certain railway station called King's Cross, and 601] were carriers of passengers from *thence to Finchley, and the said Leggott in his lifetime, became and was received by the defendants as a passenger, to be by them as such carriers safely and securely carried upon such railway from the said King's Cross station to Finchley for reward to the defendants. Yet the defendants did not securely carry Leggott upon the railway on the journey, but so negligently and unskilfully conducted themselves in and about managing the station at King's Cross, and the platform, that after Leggott had been so received by them as a passenger, and while he was lawfully waiting upon the platform to be carried upon the journey, a barrow or trolley was, by the negligence of the defendants, violently pushed against him, and he was knocked down and injured in his head and leg and otherwise, and, by reason of the injuries thereby occasioned to him, within twelve calendar months next before the commencement of such action, died, and such proceedings were had upon such action that a verdict was taken by consent, and afterwards judgment was signed against the defendants for the cause of action for £500 and costs, and the defendants paid to the plaintiff as administratrix £500, together with the amount of her costs in such action, and the plaintiff as such administratrix received the same in full satisfaction and discharge of the judgment and causes of action.

Reply, that the defendants ought not to be admitted to deny the facts in the first and second paragraphs denied, because it appears by the record in the action in the fifth paragraph mentioned that the defendants pleaded in answer to the declaration set out in the paragraph, first, that they were not guilty, and, secondly, that the said R. T. Leggott was not received by them to be carried as a passenger as alleged in the declaration, and that issue was joined on such pleas, and that at the trial such issues were found by the jury in the plaintiff's favor, and that judgment was signed thereon accordingly and such judgment still stands.

Demurrer to so much of the dence as is contained in the fifth paragraph, and joinder in demurrer.

The defendants also demurred to the reply, and the plaintiff joined in demurrer.

J. W. Mellor, Q.C., (Harmsworth with him), for the

*defendants⁽¹⁾. The reply is bad, for it appears from [602 the record that the action referred to was an action under Lord Campbell's Act⁽²⁾, and was brought by the plaintiff in another capacity. The plaintiff is in this dilemma. Either this is the same action as the one previously brought, or it is not the same cause of action, in which case there is no estoppel.

[QUAIN, J.: If the issue is the same, and the parties are the same, the finding by the jury is conclusive whether the cause of action is the same or not.]

This was not an action between the same parties in the same rights or in respect of the same subject-matter of complaint: *Duchess of Kingston's Case*⁽³⁾. This being the case, there can be no estoppel. The administratrix sues in two different capacities, and must be regarded in each action as a different person.

[QUAIN, J.: Is there any authority that, where a person is suing in one action as trustee for A. and in another as trustee for B., the estoppel does not apply?]

There is no express authority, but in *Doe d. Hornby v. Glenn*⁽⁴⁾ it was held that an administrator could bring ejectment though he had, before taking out administration, arranged to surrender the premises to the defendant, on the ground that his agreement as administrator de son tort did not conclude him as lawful *administrator. *Metters* [603 v. *Brown*⁽⁵⁾], where it was held that the plaintiff, suing as administrator of his mother, was not concluded by a deed which he had executed in her lifetime, is a similar case. Secondly, supposing there is no estoppel, *Bradshaw v. Lan-*

⁽¹⁾ The plaintiff's demurrer had been withdrawn in consequence of the defendants having amended their pleadings, but it was restored by consent during the argument; and the defendants therefore began.

⁽²⁾ By Lord Campbell's Act (9 & 10 Vict. c. 93), s. 1, "Whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured."

By s. 2, "Every such action shall be

for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find direct."

⁽³⁾ 2 Sm. L. C., 5th ed., 656.

⁽⁴⁾ 1 A. & E., 49.

⁽⁵⁾ 1 H. & C., 686; 32 L. J. (Ex.), 138.

cashire and Yorkshire Ry. Co. (') is no authority to show that an action like the present one may be brought after a recovery under Lord Campbell's Act. It is true, that that case decided that where a passenger on a railway died from injuries caused by the negligence of the railway company, his executrix might recover damages to his estate arising in his lifetime from the injury. But the case does not decide that two actions may be brought, one under Lord Campbell's Act and another for damages sustained in the lifetime of the deceased. There is also strong ground for contending that *Bradshaw v. Lancashire and Yorkshire Ry. Co.* (') was wrongly decided, for the case of *Potter v. Metropolitan District Ry. Co.* ('), upon which it proceeded, is distinguishable.

Bray, for the plaintiff: First, the defendants are concluded by the finding of the jury in the previous action. The plaintiff is suing in identically the same capacity as before. She brings this action as administratrix of the person deceased, and she brought the previous action under Lord Campbell's Act, as administratrix. In such an action it is unnecessary to state that the administratrix is suing for the benefit of the relations of the deceased. In each action the same person is plaintiff, and has the same opportunity of cross-examining.

[QUAIN, J.: Could the plaintiff in the previous action have released it?]

Yes, unless there were evidence of default on her part. An estoppel, as appears from the notes to the *Duchess of Kingston's Case* ('), binds parties and privies to the previous proceedings. The reason why strangers are not bound is because the previous proceedings were *res inter alios acta*, which they were not at liberty to controvert: Buller's *Nisi Prius*, p. 233. This observation does not apply to the present plaintiff. The case of **Bradshaw v. Lancashire and Yorkshire Ry. Co.* (') must be taken to have decided that two actions may be brought, an action under Lord Campbell's Act and an action for injuries in the lifetime of the deceased. If it were otherwise, and a judgment in one action were a bar to the other, the plaintiffs would have to run a race as to who should first obtain judgment.

MELLOR, J.: I think this case is very well put by Mr. Bray, but we have come to the conclusion that it is a case

(') Law Rep., 10 C. P., 189.

(*) 30 L. T. (N.S.), 763.

(*) 2 Sm. L. C., 5th ed., 664.

in which an estoppel does not arise. It seems that though nominally the machinery of the action in the one case is the same as the machinery in the other, yet the action in which the verdict has been recovered was an action of a very special and limited description. It was an action given expressly by the statute, and must be confined within the limits of the statute. It was to provide for what the law had not before provided for, namely, the right of an administrator or executor to sue for the benefit of the family in respect of the death of the deceased, occasioned by the negligence of other persons, and the recital of the act is that "no action at law is now maintainable against a person who by his wrongful act, neglect or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him." It is therefore enacted that "whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof" (it is limited entirely to this), "then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." Then in the 2d section it expressly enacts "that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased." Then the jury are to assess damages proportioned to the injury. By the later statute, 27 & 28 *Vict. c. 95, the machinery is altered. There [605 it is recited that persons may lose the benefit of the act, either from the expense of taking out probate or because of the neglect of the executor, therefore the action is given directly to the person injured, but it is exactly in respect of the same matter and the same cause limited by Lord Campbell's Act.

This being the state of things, the executor being the mere machine, and this being the form of machinery provided, by which an action can be maintained, the interest of the executor is in maintaining an action strictly within the limits of Lord Campbell's Act, and the question arises, can an admission on the record, made where the right of the executor to bring the action is expressly so limited, be

set up in another action brought by the executor generally in respect of the assets and estates of the deceased, so that in that action the defendants who have submitted in the former action are to be precluded from denying the facts alleged in the second action? I think that there is no estoppel under those circumstances; although the machinery nominally is the same, the entire object and effect of the action is totally different, and any admission made by the executor, if it were on his side or her side, would not be available in a subsequent action which was brought in respect of the general assets of the deceased. It is to be observed that the executrix in a case under the act, does not sue in respect of anything which belonged to the deceased, but by force of the statute which enacts that the deceased's death is to be made the subject of an action just as if he had lived. I think, therefore, the estoppel does not arise, and that the defendants were at liberty to traverse these allegations. With the single exception, so far as I am aware, of the case in the Common Pleas, *Brandshaw v. Lancashire and Yorkshire Ry. Co.* (¹), there appears to be no authority that an action will lie by the executor in respect of what is claimed in this action. But as that case has been decided on the very point, I entirely yield to the authority of the decision, so far as to say that in this court it cannot be questioned, and we must therefore abide by it. I must say, however, that we yield to it for the purposes of this case, and that, at all events, if it is to be questioned, it must be questioned in a Court of Appeal.

606] *QUAIN, J.: I am of the same opinion. I think the defendants are entitled to judgment upon the demurrer to the estoppel. The rule about the estoppel is very correctly, I think, laid down in the note to the *Duchess of Kingston's Case* (²). It is this: "It must be observed that a verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and, in fact, is a different person in law." In other words it is generally put in the books that the plaintiff must not be only the same person, but he must be suing in the same right. I think that in these two actions before us, although the administratrix nominally is the plaintiff, yet the administratrix is not suing in these two actions in the same right, but in very different rights altogether, and, therefore, that the estoppel does not arise. The present action which is now before us is an action by an administratrix in the ordinary sense of

(¹) Law Rep., 10 C. P., 189.

(²) 2 Sm. L. C., 7th ed., p. 792.

that word, representing the estate of the intestate and in point of fact bringing an action for a loss to that estate. It is the ordinary action brought by an administrator or executor, either to increase the estate generally, or for some loss that the estate has suffered in consequence of some acts within the statute, 4 Edw. 3, c. 7, which enables an executor to bring an action for damages to the personal estate. But when we come to look at the previous action it seems to be an entirely different kind of thing. Lord Campbell's Act enables an action to be brought in a case where it could not have been brought before that act, namely, when the man has suffered a personal injury and dies in consequence. After his death, before Lord Campbell's Act, no such action could have been maintained, because the death destroyed it. It fell with the life of the individual injured. Now Lord Campbell's Act gives an entirely new action, not an action connected with the estate of the deceased in the slightest degree, and the damages recoverable in it would be no part of the estate of the deceased. The act merely says that the nominal person to bring the action on behalf of certain relations (not on behalf of the next of kin or the creditors of the deceased, but on behalf of the beneficiaries, certain relations named in the act of Parliament) shall be the executor or the administrator. It is plain, therefore, that an action brought by the person *designated by the statute is [607 brought in an entirely different right from that in which the action is brought by the executors generally as representing the estate of the testator or intestate. I therefore feel clear upon the point that these actions are not brought in the same right, and that, therefore, the finding in the one does not constitute an estoppel in the other. I see that that very distinction is pointed out by my Brother Grove in his judgment in *Bradshaw v. Lancashire and Yorkshire Ry. Co.* (1): "In the case of such right of action," that is to say, such as the present action, "he sues as legal owner of the general personal estate which has descended to him in course of law; under the act" (that is, Lord Campbell's Act) "he sues as trustee in respect of a different right altogether, on behalf of particular persons designated in the act." It is true that in that case no question of estoppel arose, but my Brother Grove points out the very distinction we now take, and on which we decide this case, that these actions are not brought in the same right. Therefore the finding in the one is no estoppel in the other.

(1) Law Rep., 10 C. P., at p. 192.

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With regard to the action itself, I merely say, I yield to the decision in the Common Pleas, but without assenting to it.

Judgment accordingly.

Solicitors for plaintiff: *May, Sykes & Batten.*

Solicitors for defendants: *Johnston, Farquhar & Leech.*

See 3 Eng. Rep., 390 note.

A judgment against one joint trespasser is no bar to a suit against another for the same trespass; nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar: *Elliot v. Porter*, 5 Dana (Ky.), 299; *United, etc., v. Underwood*, 11 Bush (Ky.), 270; *Knight v. Nelson*, 117 Mass., 458; *Smith v. Smith*, 51 N. H., 572; *Lovejoy v. Murray*, 3 Wall., 1; *Griffie v. McClung*, 5 West Va., 131.

In *Kentucky* it is held that the injured party may pursue each joint wrongdoer to judgment and satisfaction. That he may proceed against solvent defendants, or where no one of them is able to or can be compelled to pay the whole judgment rendered against him, the injured party may accept part satisfaction from one and still look to the others for such balance as may be necessary to give him full legal compensation for the wrong suffered; but, ordinarily, when he has made his election he will be concluded by it. That when the injured party sues one of several joint wrongdoers and recovers a judgment, which he elects to enforce and which is in part satisfied, he is estopped in a subsequent action against a different defendant, for the same cause, to claim a greater sum in the way of damages than was adjudged to him in the first action.

Plaintiff may defer his election by declining to enforce his judgment, leaving the question of amount to which he is entitled an open one, until he sues and recovers against all who are liable to him, and then elect which judgment he will enforce; or he may sue upon his original cause of action and compel the defendant to rely, by way of evidence, upon the first judgment and his election to enforce it, thereby estopping each party from questioning the correctness of that

judgment: *United, etc., v. Underwood*, 11 Bush (Ky.), 265.

In *Indiana* it is held that one sustaining injury from several wrongdoers may sue each and proceed to judgment, but that when he proceeds to and does issue execution, his right to proceed against the others is gone: *Fleming v. McDonald*, 50 Ind., 278.

So in *Alabama*: *Golding v. Hall*, 9 Porter, 169; *Blaun v. Cocheron*, 20 Ala., 320.

So in *South Carolina*: A recovery against one has been held a good defence in bar: *Smith v. Livingston*, 2 McMullan, 184.

So in *Upper Canada*: *Adams v. Ham*, 5 U. C. Q. B., 292.

So a recovery in tort against one wrongdoer has been held a bar to an action upon the contract of the sureties of such wrongdoer as a sheriff: *Sloan v. Creasor*, 22 Upper Can. Q. B., 127.

So where the plaintiff sued a sheriff for falsely returning *nulla bona* to a *fi. fa.*, on which he had made the money, held he could not afterward sue the sheriff and his sureties on their covenant for not paying over such money: *Miller v. Corbitt*, 26 Upper Can. Q. B., 478.

Where several parties are liable for the same injury, either in tort or on contract, a recovery against one and a satisfaction thereof, or a satisfaction by consent, is a bar to a suit against the others: *McDonald v. Gregory*, 41 Iowa, 517; *Taylor v. Chambers*, 1 Iowa, 124; *Ellis v. Betser*, 2 Ohio, 89; *Ayer v. Ashmead*, 31 Conn., 449; *Turner v. Hitchcock*, 20 Iowa, 310; *Metz v. Soule*, 40 Iowa, 236, 238, and cases cited; *First, etc., v. Indianapolis, etc.*, 45 Ind., 5.

Some authorities hold that if the amount received is understood to be only in part satisfaction, it will not operate to satisfy the whole demand, but any one sued may avail himself *pro tanto* of such partial payment:

Snow v. Chandler, 10 N. H., 92; Bonney v. Bonney, 29 Iowa, 448; Sloan v. Herrick, 49 Verm., 327.

"In Pennsylvania, the rule is settled that a recovery, in an action of tort, of the value of a specific chattel, without satisfaction of such judgment, so far divests the plaintiff of his title that he is barred from asserting it in any other action. This rule has never been adjudicated on by the courts of this state. But as between co-defendants, it is clear that in an action *ex delicto*, for the value of a chattel, he who pays the judgment becomes the sole owner. In replevin, if the count is in the *detinuit*, the legal intentment from the record is, that the damages were not for the value of the chattel, but for its detention only." Fox v. Prickett, 34 N. J. Law, 13.

A defendant in trover, against whom damages are given for the full value of the property converted, gets title to the property by payment of the judgment. And no one has a right to full damages unless he is in such a position that title will thus pass from him at the time of the trial and judgment: Smith v. Smith, 54 N. H., 571; Brady v. Whitney, 24 Mich., 154.

A plaintiff in trover, who has transferred his title after the conversion, can only recover nominal damages, unless there has been some special damage caused by the taking and detention: Brady v. Whitney, 24 Mich., 154.

The title of a wrongdoer who pays a judgment recovered for property converted takes effect, by relation, from the time of the conversion: Smith v. Smith, 51 N. H., 571.

Where a release by one of several joint and several debtors has been executed, and those not parties to it claim the benefit thereof, the burden is upon them of showing that the instrument was such as barred an action against all. It will not be inferred for the purpose of reversing a judgment that the release is absolute and not a special and limited one, such as is authorized (Chap. 257, Laws 1835) to be given to

one joint debtor without affecting the liability of the others (Rapallo, J., dissenting). Bolen v. Crosby, 49 N. Y., 183.

Where separate actions have been commenced against two joint wrongdoers, one of which has been prosecuted to judgment, a dismissal of the pending action upon payment of a sum intended to be in settlement of costs only, and an acknowledgment of satisfaction, does not operate to satisfy the judgment against the other, either wholly or *pro tanto*: Bell v. Perry, 43 Iowa, 368.

In Maine it has been held that a joint action for negligence, where by one going on a wharf, would not lie against a corporation and its agent: Campbell v. Portland, etc., 62 Maine, 552, 566-7.

Where parties by fraud have induced another, innocently, to convert the property of a third for their benefit, and have undertaken his defence of a trover suit brought by the latter and have failed, and execution has been levied on his property sufficient to satisfy the judgment, the measure of damages in his action against them for the fraud, is the amount of the judgment against him, with interest, though he has not paid such judgment.

The recovery in the trover suit would put an end to any right of the plaintiff therein to reclaim the property, and would leave the title in those at whose instance and for whose benefit the conversion was brought about.

A recovery and execution levy against one of several who were jointly guilty of conversion, precludes recourse against the others on account of the same conversion; the principle as to joint trespassers being applicable: Kenyon v. Woodruff, 33 Mich., 310.

See *ante*, 148 note, as to remedy by stay of proceedings in favor of one joint wrongdoer where the injured party has so far proceeded against others of such joint wrongdoers as to preclude him from proceeding against the party asking such stay.

C A S E S
DETERMINED BY THE
COMMON PLEAS DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE COMMON PLEAS DIVISION,
XXXIX VICTORIA.

[1 Common Pleas Division, 286.]

May 10, 1876.

[IN THE COURT OF APPEAL.]

**286] *LE BLANCHE V. THE LONDON AND NORTH WESTERN
RAILWAY COMPANY.**

Railway Company—Liability for Want of Punctuality—Measure of Damages—Special Train.

The plaintiff took a ticket for Scarborough at the defendants' station at Liverpool. The journey from Liverpool to Scarborough is via Leeds and York. The defendants' train only goes to Leeds; and from Leeds to Scarborough the journey is over the lines and by the trains of other companies. The ticket referred to the conditions in the defendants' published time bills, of which the most material part was as follows: "The published train bills are only intended to fix the time at which passengers may be certain to obtain tickets for any journey from the various stations, it being understood that the trains shall not start before the appointed time. Every attention will be paid to insure punctuality, so far as it is practicable; but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. . . . The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party."

The train by which the plaintiff travelled was too late at Leeds to catch the train by which the plaintiff should have proceeded to York; and when the plaintiff did

arrive at York, at about 7 p.m., he found that the train for Scarborough which he should have caught had gone, and that the next train for Scarborough did not start till 8 p.m., arriving at about 10 p.m. He thereupon took a special train from the North Eastern Company, which arrived at Scarborough between 8.30 and 9 p.m. The plaintiff had no business or engagement in Scarborough necessitating his being there at any particular time.

The plaintiff brought an action against the defendants in the county court, and the county court judge held that there was a contract on the defendants' part to use due diligence to insure punctuality, and that, upon the facts, there had not been such diligence used. He also held that the plaintiff was entitled to recover the cost of the special train on the authority of the dictum of Alderson, B., in *Hamlin v. Great Northern Ry. Co.* (26 L. J. (Ex.), 22), that "where one party to a contract does not perform it, the other may do so for him as near as may be, and charge him for the expense incurred in so doing."

On appeal to the Court of Common Pleas, that court affirmed the judgment of the county court judge. On appeal from that decision to the High Court of Appeal:

Held (reversing the decision of the Common Pleas), that the county court judge was wrong in acting on the dictum above mentioned as an absolute [287 rule. The principle is, that if one party does not perform his contract, the other may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing; and a proper test of what is reasonable in such a case as the plaintiff's is to consider whether, according to the ordinary habits of society, a person delayed on his journey, under circumstances for which the company were not responsible, would have incurred the expenditure in question on his own account:

Held, also, by the majority of the court (James and Mellish, L.J.J., Bagdollay, J.A., and Mellor, J.), that the words "Every attention will be paid to insure punctuality as far as practicable" did import a contract to use due attention to keep the times specified in the time bills as far as practicable, having regard to the necessary exigencies of the traffic and circumstances over which the company had no control.

Per Cleasby, B.: The effect of the conditions was that the company declined to enter into any contract as to the times specified in the time bills, whether absolute or qualified.

Per Bagdollay, J.A.: The contract in the conditions was such as to protect the defendants from any further liability in a case where they issued a through ticket than they would have incurred if they had only issued a ticket to the farthest point of the journey on their own system.

Per James, L.J.: The true meaning of the contract was, that the persons in the management of the train would, with regard to the particular train on that particular journey, use due attention to insure punctuality, but that the defendants were not to be held responsible for delays arising from circumstances unconnected with the management of the particular train.

APPEAL from a decision of the judge of the Bloomsbury county court.

1. The plaintiff is a ship-broker carrying on business in London, and the defendants are the London and North Western Railway Company.

2. The action was brought to recover £11 10s., being the cost of a special train taken by the plaintiff under the circumstances hereinafter mentioned.

3. The cause was heard on the 20th of November, 1874, before the judge, without a jury.

4. The following facts are not in dispute: On the 18th of August, 1874, the plaintiff, travelling with a friend, Mr. Bigland, took a first-class ticket at the defendants' station at Lime Street, Liverpool, by the 2 p.m. train for Scar-

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borough, *via* Eccles, Staleybridge, Huddersfield, Leeds and York. The ticket had indorsed upon it the words "Issued by the London and North Western Railway Company sub-288] ject to the company's regulations and to the *conditions of the time tables of the respective companies over whose lines this ticket is available."

The times of that train, as shown by the time tables of the defendants, and which were in evidence, were as follows: Leave Liverpool, Lime Street, 2 p.m.; Edge Hill, 2.7; St. Helen's Junction, 2.26; Newton Bridge, 2.35; Ordsall Lane, 3.0; arrive Manchester, 3.5; leave Manchester, 3.20; Ashton, 3.38; arrive Staleybridge, 3.43; leave Staleybridge, 3.47; Huddersfield, 4.17; Mirfield, 4.29; Dewsbury, 4.38; Batley, 4.42; arrive Leeds, 5.0; leave Leeds, 5.20; arrive York, 6.5; Scarborough, 7.30.

The conditions referred to were, so far as they are material for the present case, in the words and figures following:

"The arrival time denotes when the trains may be expected; but the passengers, to insure being booked, should be at the principal stations five minutes earlier, and the intermediate stations ten minutes earlier. The doors of the booking-office will be closed punctually at the hours fixed for the departure of the trains, after which no person can be admitted.

"Time Bills. The published train bills of this company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations; it being understood that the trains shall not depart before the appointed time. Every attention will be paid to insure punctuality as far as it is practicable; but the directors give notice that the company do not undertake that the trains shall start and arrive at the time specified in the bills; nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. The right to stop the trains at any station on the line, though not marked as a stopping station, is reserved.

"The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public: but the company do not hold themselves responsible for any delay, detention or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party."

5. The plaintiff and Mr. Bigland stated that, having taken

tickets, as mentioned in paragraph 4, the train left Liverpool two or three minutes after 2 p.m., and arrived at Leeds about 5.27 p.m. [It was admitted that the train was 27 minutes late at Leeds;] and that, on arriving at Leeds, they found that the train of the North Eastern Railway Company, by which they would in the ordinary course have proceeded, had left Leeds, the time fixed for its departure being 5.20 p.m. They therefore proceeded to York by the next train, which left Leeds at 5.55 p.m., and arrived at *York at 7 p.m. where it stopped. On inquiry, they [289 found that the next train from York to Scarborough would not leave until 8 p.m., and was timed to arrive at Scarborough at 10 p.m. Thereupon they took a special train from York to Scarborough, and arrived there between 8.30 and 9 p.m. If the plaintiff had been able to catch the 5.20 North Eastern train at Leeds, he would, in the ordinary course, have arrived at Scarborough at 7.30 p.m. .

Neither the plaintiff nor Mr. Bigland had any business or engagement whatever necessitating his arrival at Scarborough at any particular time.

In his evidence,—which was admitted, subject to objection by the counsel for the defendants,—the plaintiff, speaking of what had passed at Manchester, stated as follows: “My friend spoke to the London and North Western guard. I do not know whether he was the guard of the train; but he was on the platform regulating the trains, holding up his hand when we started. I heard my friend ask the guard, ‘Why are we detained?’ The guard replied that some train had arrived with passengers, the passengers of which train ordinarily went on by a later train, and there was delay in putting on carriages to take those passengers on by our train. That is my impression and recollection of the words. It is the substance of what took place. We were delayed as near as possible half an hour,—twenty-five to thirty minutes;” and in his cross-examination (looking at a witness for the defendants, named Blomerley), he said: “I think that is not the man. I cannot say whether I should identify him.”

Mr. Bigland, upon the same point, in his evidence stated that he had a conversation with the guard, and that the plaintiff had correctly stated that conversation; and, on cross-examination on the point, he said that he could not identify the guard, but knew he was a guard by his dress; that he did not know how many guards there were of the train; and that the guard told him that, “if we had been sent on at the proper time, we should not have taken the

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passengers then coming in, and who were expected to go by the following train;" that the extra delay was, to have extra carriages put on. Mr. Bigland added that he could not say what train was referred to, or anything more about it, he had made no inquiries whether there was any such 290] train; that he *could not identify the man. On his re-examination, he said he did not take notice if the man gave directions as to the train; that he saw the passengers coming along the platform; that there was delay in putting on carriages; that he did not know where the passengers came from; but that they came from an entrance on the right hand side, and he saw them passing along past the carriage he and the plaintiff were in.

6. Upon this evidence, the counsel for the defendants submitted that the plaintiff ought to be nonsuited, on the ground that there was no evidence of negligence or of any breach of duty by the defendants or of the contract entered into in the ticket coupled with the conditions. But the learned judge declined to nonsuit, and said he would hear the whole of the evidence, and give the defendants leave to appeal upon the question whether or not he ought to have nonsuited the plaintiff.

7. The defendants called, among other witnesses, Mr. Fourdrinier, the chief assistant to the general passenger superintendent, who described the line over which the defendants' train had to run in passing from Lime Street, Liverpool, on to Leeds. He proved that, after leaving Liverpool, the train ran for $31\frac{1}{2}$ miles over the line of the defendant company to Victoria Station, Manchester, where it came upon the line of the Lancashire and Yorkshire Railway Company. The signals for the admission of the train on to the line of the Lancashire and Yorkshire company were regulated by and under the sole control of the Lancashire and Yorkshire Railway Company's servants. From Victoria Station, Manchester, the train ran for 8 miles over the line of the Lancashire and Yorkshire Railway Company to Staleybridge Junction, where it entered on the line of the Manchester, Sheffield and Lincolnshire Railway Company; the signals regulating the admission of the train being under the sole control of the servants of the Manchester, Sheffield and Lincolnshire company. From Staleybridge Junction it ran for 17 chains over the line of the Manchester, Sheffield and Lincolnshire Railway Company, and through Staleybridge, a station under the control of the Manchester, Sheffield and Lincolnshire company's servants. On leaving the Manchester, Sheffield and Lincoln-

shire line, the train ran for $21\frac{1}{2}$ miles over the defendants' line to Heaton Lodge *Junction, where it came upon [291] the line of the Lancashire and Yorkshire Railway Company, over which it ran for a distance of $2\frac{1}{4}$ miles to Dewsbury Junction, which $2\frac{1}{4}$ miles were under the sole control of the Lancashire and Yorkshire company's servants. On leaving Dewsbury Junction, it ran for $8\frac{1}{4}$ miles over the line of the defendants to Whitehall Junction, from which place it ran over the line of the Midland Railway Company a distance of 16 chains, which 16 chains were under the sole control of the Midland Railway Company's servants. From thence, it ran over the line of the defendants for 29 chains into the station of the defendants at Leeds. At each point where the train entered the line of another company, the signals are under the sole control of the servants of the company whose line is entered. Mr. Fourdrinier also stated that the times given in the company's time tables for the expected arrival and departure of trains were prepared in the office of the chief passenger superintendent, and under his supervision.

8. The counsel for the defendants then proposed to ask the witness whether it was or was not possible, having regard to the nature of the traffic on such a line as this, to run trains so as to keep punctually their appointed time. The question was objected to by the counsel for the plaintiff, and was rejected by the learned judge, who, however, reserved to the defendants the question whether or not he ought to have admitted the evidence.

In cross-examination by the plaintiff's counsel, this witness stated that it was customary in his department, in fixing the time of arrival of trains, to bring experience to bear in providing for ordinary delay, and to take into consideration contingencies arising from passing junctions and running over lines under the control of other companies; and that such times were fixed after consultation with such other companies.

9. Blomerley, the principal guard of the train, which is called the Leeds Express, gave from his book the times of arrival and departure at and from the different stations upon the journey in question, showing a loss of 2 minutes in starting from Liverpool, 3 more in starting from St. Helen's Junction, 5 more at Ordsall, and 5 more at Manchester, and, upon the whole journey from Liverpool to Leeds a loss of 27 minutes,—the train arriving at *Leeds at 5.27 p.m. [292] instead of 5.0; the train for Scarborough (a North Eastern train) leaving Leeds at 5.20. He denied that he had had any conversation with any of the passengers as to the cause

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of the delay, or that there was longer detention at any of the stations than was necessary to get the passengers in. But he admitted, on re-examination, that the trains had not been punctual on any day during that week.

10. Upon this evidence, the defendants' counsel submitted that the defendants were entitled to judgment, on the following (among other) grounds, in addition to those already mentioned in paragraph 5 of the case: 1. That it was clearly shown that the delay was not occasioned by the defendants' negligence. 2. That the conditions hereinbefore set out protected the defendants from responsibility for delay occasioned by causes other than the negligence of their own servants. 3. That the delay which in fact caused the train to arrive too late to catch the North Eastern train at Leeds, was proved to have been occasioned by the acts of persons over whom the defendants had no control. 4. That the defendants were protected by the terms of the above conditions from the consequence of the train failing to arrive in time for the plaintiff to catch the North Eastern train.

11. The counsel for the defendants further contended that the damages claimed by the plaintiff were too remote, and that the plaintiff was only entitled to nominal damages, or, at most, to such damages as the learned judge might think fit to award to the plaintiff for being prevented from arriving at Scarborough until 10 p.m. instead of the time at which he would have arrived had the 2 p.m. train from Liverpool kept the published time, viz., 7.30 p.m.

12. It was contended, on the other hand, on the part of the plaintiff, that the defendants were guilty of negligence in failing to start the train punctually from Liverpool, and in keeping the booking-office open until the time fixed for the departure of the train; that the delays which subsequently occurred might have been foreseen and prevented; and that the defendants were not protected from the consequences of such delays by their regulations and conditions, inasmuch as such regulations and conditions could only apply to causes over which the defendants had no control; and, further, if it were necessary so to contend, that, notwithstanding the conditions, the defendants must be held liable for the negligence of companies over whose lines they had running powers; but that it was not necessary to raise this question, as there was sufficient evidence of negligence of the defendants on their own line: and, lastly, as to damages, that the plaintiff was entitled to the cost of the special train, as he was justified in completing the contract which the defendants had failed to perform.

13. The judge took time to consider; and on the 4th of December, 1874, gave the following judgment in favor of the plaintiff, for the full amount claimed:

This is an action by a gentleman who was a passenger on the defendants' railway, the London and North Western Railway, to recover damages for the alleged negligence of the company, in not keeping time. On the 18th of August last, the plaintiff, wishing to go from Liverpool to Scarborough, went to the London and North Western Station at Liverpool and took a first-class ticket there to Scarborough by the train which, according to the company's tables, was to leave Liverpool at 2 in the afternoon and arrive at Scarborough at half-past 7. The train was called the Leeds Express Train. The London and North Western Company issued a through ticket, which is issued by the London and North Western Railway Company, subject to the company's regulations and to the conditions in the time tables of the respective companies over whose lines this ticket is available.

The whole of the line is not on the London and North Western Railway; but, to Manchester, 31½ miles, it is their own line. There the defendant company run on the Lancashire and Yorkshire, and then on the Manchester, Sheffield, and Lincolnshire, and then again on their own line; then again on the Lancashire and Yorkshire; then again on their own line; and (whether for a short distance on the Midland before arriving at Leeds, I do not know), from Leeds, on the North Eastern Railway, through York, to Scarborough.

The train started from Liverpool 3 minutes late, and it lost time on its way to Manchester, where it arrived 13 minutes late, viz., 3.18 p.m., instead of 3.5. The proper time to leave Manchester was 3.20; but in fact they did not leave until 3.35, so that 15 minutes were lost there. Something was said about its being 17 minutes, but I cannot find that in the evidence of the guard; the difference is only between 15 minutes and 17 minutes, viz., 2 minutes. Between leaving Manchester and reaching Leeds more time was lost, and the train reached Leeds at 5.27, instead of at 5, or 27 minutes late. From Leeds, the on train was, as I have said, a North Eastern train, and the plaintiff missed that on train. It was to start, according to the time tables issued by the London and North Western Railway Company, at 5.30, and had gone 7 minutes. The plaintiff had therefore to wait until the next train, which started at 5.55, to reach York at 7. If the proper train had not been missed at Leeds, the plaintiff would have reached York at 6.5; but in fact he did not arrive there until 7. There *was no train on until 8, by which, if it kept time, he would have [294] reached Scarborough at 10. The plaintiff considered that he was much ill treated by the company, who, having agreed that he should reach Scarborough at 7.35, proposed that he should not reach it until 10; that this was the result of their negligence, not of any circumstances which were beyond their control; and that it was a breach of contract; and he therefore ordered a special train on to Scarborough (where he arrived at 8.30), for which train he paid £11 10s. He now sues the London and North Western Railway for damages for breach of their contract, claiming that £11 10s. as the damage he has sustained. The grounds of the defence are,—first, that there was no unreasonable delay,—and, secondly, even if there were, having regard to the contract with the plaintiff, the company are not liable.

I think there was an unreasonable delay. It must be assumed that the time published by the company in their time tables is the time which the company consider to be a reasonable time, that is to say, the time in which, apart from any unusual circumstances, the journey can be well performed. Now, in this case, there were no such unusual circumstances shown; and, on the contrary, there is evidence of time lost on more than one occasion simply by what I am obliged to consider to be on the part of the company, and in the words of the condition, "a want of attention to insure punctuality." Such was the keeping the doors open at Liverpool to the last moment for passengers, and thus delaying the train and the passengers who were punctual, to enable passengers who

were not punctual, but who had come late, to join the train with their luggage. Such also was the delay at St. Helen's Junction, occasioned by the shunting of a goods train belonging to the defendant company at the time this train was due, and which stopped this train at that station. Such was the delay at Ordsall Lane for a local train of the defendants: and such also the delay at Manchester, to put on an extra carriage, in order to take passengers who, had the train not been late, would have gone by the next train, at 3.50. The loss at each of these places was very trifling, but in the aggregate it amounted to 15 minutes in a run of 1 hour and 5 minutes, or nearly one-fourth more than the published time. Probably no one would complain of such a loss of time, if the journey had ended at Manchester: but by this delay, unfortunately, the on train from Leeds was lost, and that loss occasioned a further delay, and then the on train from York was lost, which occasioned still further delay. Thus, this apparently small loss of 15 minutes at Manchester was sufficient to lead to a delay of 2½ hours in reaching Scarborough, viz., arriving at 10, instead of 7.30, or a journey of 8 hours instead of a journey of 5½ hours.

Now, there is no sufficient explanation given of the delays between Liverpool and Manchester which I have mentioned. The wish to give the greatest possible accommodation to the greater number of the public may have led to a part of the delay; and the pressure of the regular or ordinary traffic, distinguished from anything unusual, may have been such as to have also contributed to the delay: but I hold that these circumstances, if existing, are no sufficient answer to one in the position of the plaintiff. I fear, upon the evidence, that the truth is that, in the published time tables, sufficient time is not allowed for the regular and ordinary traffic; and I am of opinion that in this case proper attention was not paid to insure to the plaintiff punctuality, in other words that there was negligence on the part of the company and their servants.

295] *The second ground is that the company are relieved, by reason of the conditions,—that, having regard to their contract, they are exempt from liability. I stated in the course of the argument that I held that the plaintiff is bound by these conditions, although, as he stated, he in fact knew nothing about them. They are referred to on the company's ticket⁽¹⁾, and they bind him. I also held, on the construction of this condition, that the words "every attention will be paid to insure punctuality," would cover all the rest, so far, at all events, as the line of the London and North Western Railway Company is concerned. I cannot do better than read, upon the construction of the agreement, my judgment on a former case in which I had to give judgment against the London and North Western Railway Company on the 5th of March, 1874, which was to this effect: "Apart from authority, I am of opinion that it is not the true construction of the contract that the company can be relieved from the [consequences of the] negligence of their own servants. I think that the contract bound the company to this, that every attention would be paid to insure punctuality as far as practicable; and I think also that that must include every attention on the part of the company's servants: and I read the rule to be; that, subject to every attention-being paid by the company and their servants to insure punctuality as far as is practicable, the company do not undertake that the train should arrive at the time stated, and will not be accountable for any loss, inconvenience, or injury which may arise from delays; and that, subject as before, the company do not hold themselves responsible for the arrival of this company's trains in time for the nominally corresponding trains of any other company. It is true that the latter part of the rule is introduced by the word 'but': and the argument for the company is, that the true construction of the whole sentence is, that the latter part accompanies the former as a limit to it, or an exception. But I think that less violence is done to the sentence by construing it not to relieve the company from their own negligence, than by construing it to mean that every attention will be paid to insure punctuality, but we do not bind ourselves to it, and we are at liberty to neglect that and pay no attention at all. The company's construction makes the sentence contradictory in itself. I think

(1) See *Henderson v. Stephenson*, Law Rep., 2 H. L. Sc., 470.

also the public have a right to say, if a company intends to be protected against their own negligence, they should say so."

Now, I have already shown that, in my judgment, there was negligence on the part of the company in this case; and I hold that the condition affords no defence to that negligence. I have purposely avoided any reference to any delay off the company's own line. The arguments of Mr. Russell and the facts of this case show how grievously inconvenient to the public it would be if that condition, that the company will not be responsible for any delay off their own line, was held to be a legal condition. But, if I were called upon to decide it, I do not at present see my way to holding that the condition is not legal. In the view I take of the facts of this case, however, I am not called upon to decide the point. The delay up to Manchester, which was clearly on their own line, was sufficient to lose the on train, which occasioned the subsequent delay in arriving at York. There must, therefore, be judgment for the plaintiff.

The question then arises as to the amount of damages,—whether it is to be *nominal damages or more than nominal damages; and I am of opinion [296] that the plaintiff is entitled to more than nominal damages, viz., to the £11 10s., the costs of the special train. In contract (not in tort), a man can recover only such money damage as he can prove to have been occasioned by the breach of the contract; whatever annoyance or whatever inconvenience he may have suffered, he cannot in a case of contract recover any damages for that, he is strictly confined to money damages. The plaintiff in this case sustained no money damage by the delay, except it be the cost of the special train. Had he gone on from York by the eight o'clock train, and arrived at Scarborough at ten, instead of half-past seven, he could not have shown any pecuniary damage; but he said, "I wish to be taken on by a special train, and I am entitled therefore to be paid that expense;" and in principle I think he is. I cannot better state the principle than in the words of Alderson, B., in *Hamlin v. Great Northern Ry. Co.*⁽¹⁾. That was a case in which there was no on train for the plaintiff, and he was delayed that night at the place; but, in the course of the argument, Alderson, B., said: "The principle is, that, if the party does not perform his contract, the other may do so for him as near as may be, and charge him for the expense incurred in so doing." Then, with reference to the particular case before him, he said that the plaintiff might have taken a post-chaise, and charged it. This was in the year 1856, where Alderson, B., lays down specifically what he considers the principle where a man is suing for breach of contract. That is, in truth, not a novel principle; it is familiar to us all in cases of contract for work and labor. Under the circumstances, I think that principle governs this case. Now, I do not mean to say that it is every trifling delay that would justify a refusal to wait; on the other hand, it is equally obvious that a train might be so delayed as to make it quite justifiable that a passenger should refuse to wait. A passenger might arrive at twelve at noon, and be asked to wait till eleven at night. That would of course be out of the question. It must, therefore, be to a certain extent a question of degree in each case; and I think that the difference in the case between a journey of five and a half hours and a journey of eight hours is a substantial difference, and such as in law (whatever otherwise may be thought of it) to justify the taking a special train; and, if so, the plaintiff is entitled to charge for it. I do not hesitate to say that, on the question of damages, I have had great difficulty in arriving at a judgment. The cases are very bare indeed of authority; and this is a mere dictum of Alderson, B., which is not to be found, I believe, in the other reports of *Hamlin v. Great Northern Ry. Co.*⁽¹⁾. Still it is found in the Law Journal; and it is consistent, as I have said before, with the principle which is quite familiar to us in cases of contract. Therefore, though I freely admit that I have felt great doubt on the matter, I have come to the conclusion that I am bound by the principle enunciated by Alderson, B., and therefore I give judgment for the plaintiff for £11 10s.

(¹) 1 H. & N., 408; 26 L. J. (Ex.), at p. 22.

The questions for the opinion of the court were, 1. Whether the judgment of the county court judge in favor of the plaintiff was correct,—2. Whether the plaintiff was entitled to recover the damages claimed or any and what damages 297] other than nominal *damages,—3. Whether the judge was right in rejecting the evidence tendered on behalf of the defendants.

The judgment was to be affirmed, reversed, or varied, in accordance with the decision of the court, the costs to abide the event.

Nov. 22, 1875. *Herschell*, Q.C. (*Webster* with him), for the defendants, contended that, under the circumstances, the company were not liable at all, and at all events not to more than nominal damages; that the contract was not an absolute agreement on their part that the train should arrive punctually at its destination, or in time to meet the corresponding trains throughout the journey, but a mere statement of what the company intended to do, or at the most an engagement that every reasonable effort would be made on their part to insure such a degree of exactitude as is practicable under ordinary circumstances; and that, at all events, the judge was wrong in holding that the plaintiff was justified in hiring, and entitled to charge the company with the hire of, a special train to save the unimportant delay disclosed in the case. They referred to *Stewart v. London and North Western Ry. Co.* (¹), *Hurst v. Great Western Ry. Co.* (²), *Shand v. Peninsular and Oriental Co.* (³), and *Henderson v. Stephenson* (⁴).

[DENMAN, J.: That which the plaintiff relies on as a contract is one of the things which the company call a condition, in which they profess to be contrasting that which they undertake to do with that which they do not undertake. We are not asked to say whether the county court judge was wrong in holding that upon the facts proved there was unreasonable delay. That was for him.]

C. Russell, Q.C., and *Crumpp*, *contra*, contended that, taking the ticket, the time bills, and the conditions to constitute the contract between the parties, there was no engagement on the part of the company that there should be absolute punctuality through the journey, still a duty was imposed upon them to use reasonable care to complete the several stages of the journey within the times respectively stipulated; and that, whether they had performed

(¹) 1 H. & C., 135; 33 L. J. (Ex.), 199.

(²) 3 Moo. P. C. (N.S.), 272.

(³) 19 C. B. (N.S.), 310; 36 L. J. (C.P.),

(⁴) Law Rep., 2 H. L., Sc., 470.

their contract in that respect or not, was for the jury or (in this *case) for the county court judge, whose decision [298 on the facts is conclusive,—citing *Prevost v. Great Eastern Ry. Co.* (*), and *Buckmaster v. Great Eastern Ry. Co.* (*); and that the damages awarded were such as naturally flowed from the breach of contract, according to the rule laid down in *Hamlin v. Great Northern Ry. Co.* (*).

Cur. adv. vult.

Jan. 11. The judgment of the court (Brett, Denman, and Lindley, JJ.) was delivered by

BRETT, J.: This was an appeal from a judgment of the county court judge sitting at Bloomsbury. The claim was for the cost of a special train from York to Scarborough, which train the plaintiff had ordered in consequence of his being brought from Liverpool to Leeds too late for the ordinary train from Leeds to Scarborough. The plaintiff took a first-class ticket at the defendants' station in Liverpool by the 2 p.m. train for Scarborough, *via* Eccles, Staleybridge, Huddersfield, Leeds, and York. The ticket had indorsed on it the words, "Issued, &c., subject to the company's regulations and to the conditions in the time tables of the respective companies over whose lines this ticket is available."

The time table of the defendants' company contained the following notices as to the 2 p.m. train, viz.:

Leave Liverpool	2. 0 p.m.
Arrive Manchester	3. 5
Leave —————	3.20
Arrive Leeds	5. 0
Leave —————	5.20
Arrive York	6. 5
Arrive Scarborough	7.30

Certain conditions were set out in the time tables, which were the subject of the discussion.

The train, under circumstances stated in evidence, left Liverpool two or three minutes after 2 p.m., left Manchester at 3.35, and arrived at Leeds at 5.27. The ordinary and corresponding *train for York had left at 5.20. The [299 plaintiff proceeded to York by the next train, which left Leeds at 5.55, and arrived at York at 7 p.m. The next train then from York to Scarborough would leave at 8 p.m., and was timed to arrive at Scarborough at 10 p.m. The plaintiff

(1) 13 L. T. (N.S.), 20.

(2) 23 L. T. (N.S.), 471.

(3) 1 H. & N., 408; 26 L. J. (Ex.), 20.

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thereupon took a special train by which he arrived at Scarborough between 8.30 and 9 p.m.

The county court judge came to the conclusion that there was a want of attention to insure punctuality, and an unreasonable delay whilst the train was on the defendants' line, which caused the late arrival at Leeds and the loss of the ordinary train to Scarborough; and, refusing to nonsuit the plaintiff, he held that the plaintiff was justified in taking the special train, and was entitled to charge the cost of it against the defendants.

The conditions before referred to were as follows :

"1. The arrival time denotes when the trains may be expected; but the passengers, to insure being booked, should be at the principal stations five minutes earlier, and the intermediate stations ten minutes earlier. The doors of the booking-office will be closed punctually at the hours fixed for the departure of the trains; after which no person can be admitted.

"2. Time Bills. The published time bills of this company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations; it being understood that the trains shall not start before the appointed time. Every attention will be paid to insure punctuality as far as it is practicable; but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills; nor will they be accountable for any loss, inconvenience or injury which may arise from delays or detention. The right to stop the trains at any station on the line, though not marked as a stopping station, is reserved.

"3. The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party."

It was argued before us on behalf of the defendants, the appellants, that, taking the ticket, the time table, and the conditions together, there was no contract at all as to any time of arrival; that there was no contract to arrive at the times stated in the time table; that there was no contract to make reasonable effort to arrive at the stated times; that, even if negligence were proved, by reason of which the

train did not arrive in a reasonable time and damage *were thereby caused, the conditions saved the de- [300
fendants from any liability; that no question could be
raised as to whether the conditions were or were not reason-
able, for the Railway and Canal Traffic Act did not apply
to contracts for the conveyance of passengers; that there
was no evidence of negligence or want of reasonable effort;
that, at all events, the plaintiff was not entitled under the
circumstances to take and charge the defendants with a
special train.

It was argued for the plaintiff, that either there was an
express contract that the defendants would use every atten-
tion to insure punctuality as far as practicable, or an im-
plied contract that they would make reasonable efforts that
the trains should arrive at the stated times; that there was
evidence of negligence on the part of the defendants which
caused the delay; and that the plaintiff was reasonably
justified in taking the special train, and was therefore jus-
tified in charging the cost of it to the defendants.

The questions are,—first, what facts and documents
formed the contract,—secondly, what was the contract,—
thirdly, was there any evidence of breach of contract,—
fourthly, were the damages such as might be legally pro-
nounced.

As to the first, we are of opinion that the facts and docu-
ments which formed the contract were the taking and grant-
ing the ticket, the ticket, the time tables, and the conditions.
If there were no conditions, or if the ticket did not refer to
them, it would be necessary to infer the terms of the con-
tract by implication from the fact of granting and receiving
a ticket for such a service as carriage by railway; but it is
clear, as it seems to us, that the passenger is referred to
the conditions to find the modifications of the contract which
would be implied without them. It is that reference which
makes them part of the contract.

But then, as to the second question, the reference cannot
in such case make only the negative or restrictive parts of
the conditions binding as parts of the contract; it must
equally make the affirmative and explanatory parts of the
conditions parts of the contract. The first condition and
the first part of the second, taken together, seem to amount
to a contract that every person who arrives at a chief sta-
tion five minutes before, or at an intermediate station ten
minutes before, the advertised time of departure of a train,
*shall receive a ticket to be carried and shall be carried [301
by that train. The second part of the second condition is

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relied upon by the company, and we think rightly relied upon to modify the contract which would without it be implied, and to prevent the advertising of the times of arrival and departure from amounting to an absolute contract that the train will arrive or depart exactly at such time. It prevents any liability for any loss, inconvenience, or injury which may arise from delays or detention, however long, considered as mere delay or detention; that is to say, the company does not contract that there will not in fact be delay or detention of the longest period. For instance, the company does not contract against delay or detention, however long, caused by snow, or accident, or the like. But, as the negative and restrictive part of the condition is part of the contract, so we think is the affirmative and explanatory part. We therefore think that the defendants did by the statement to that effect in the conditions contract that they would pay every attention, that is to say, make every reasonable effort, to insure punctuality as far as practicable. We further think that without the conditions there must be an implied contract that the defendants would use reasonable efforts that trains should both start and arrive at the stated times, and that there is nothing in the conditions to restrict that undertaking. The third condition, in the like manner, negatives an absolute contract that punctuality shall be observed either by the defendants or by the other companies, and negatives any responsibility of the defendants for the defaults as to punctuality of the other companies, as, for example, for even a want of reasonable effort by those companies to insure punctuality; but it does not absolve the defendants from using reasonable efforts on their part to meet the corresponding trains of the other companies.

The next question is, whether there was any evidence of a neglect by the defendants' servants of the contract to make every reasonable effort to insure punctuality, and of such neglect, if any, being a cause of the injury alleged by the plaintiff. Now, we do not think that the mere fact of there being some want of punctuality, either in starting a train from its first or any intermediate station, or in the arrival at any station, would be necessarily any evidence of 302] a want of reasonable effort. A delay of *a few minutes in the original starting may, as it seems to us, obviously occur though every reasonable effort is made to start the train punctually, and therefore would of itself be no evidence which ought to be acted upon or left to a jury of a want of reasonable effort. If any delay, however

short, is to be evidence of a breach of contract, the company is practically bound to an absolute contract to start to the moment, which we have held is not the true construction of their contract. Neither is the mere fact of some unpunctuality in arriving at or leaving an intermediate station evidence by itself of a neglect of a reasonable effort to secure punctuality. But an unusual or long delay would, we think, be evidence calling upon the company to account for it by showing that it occurred, as, by the bursting of an engine pipe, or collision, or snow or wet preventing friction, or accident, or by a sudden, unexpected, and not to be reasonably expected, pressure of passengers,—something which prevented punctuality, notwithstanding reasonable efforts to secure it were made.

We think that, in this case, the delay of fifteen minutes in starting from Manchester was of itself sufficient to require explanation; that the delay at St. Helen's Junction required explanation; and that these two facts were evidence of negligence, that is to say, of want of reasonable effort to be punctual. We should observe that we need not agree and do not agree with the idea that the defendants ought to have closed the doors at Liverpool before the advertised time, in order to shut out tardy passengers; for, the first condition contains an undertaking that the booking-office will be closed punctually, and the second that the train will not start from any station before the advertised time. But, as we have said, we think there was evidence of negligence on the part of the defendants which caused delay in leaving Manchester; and we further think that there was evidence that the delay in leaving Manchester was a cause of the too late arrival at Leeds, and so of the impossibility of arriving in time at Scarborough. If there was evidence, we have no right to interfere with the conclusion.

As to the damages, we think that the rule attributed to Alderson, B., in *Hamlin v. Great Northern Ry. Co.* (*) is a good expression of the law. We think it may properly be said that, if *the party bound to perform a contract [303 does not perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing. The same rule is laid down by Blackburn, J., in the case of *Hobbs v. London and South Western Ry. Co.* (*), who says: "The general rule is that the damages to be recovered in an action for a

(*) 1 H. & N., 408; 26 L. J. (Ex.), at p. 22.

(*) Law Rep., 10 Q. B., 111; 44 L. J. (Q.B.), 49, at p. 52.

breach of contract to supply something are, the difference between that which should have been supplied and the cost of obtaining something equally good, or, if that is not attainable, of the best substitute." We think that in this case there was evidence upon which the county court judge might not unreasonably find, and has in effect found, that the plaintiff was not reasonably called upon to wait at York for the late train, and might reasonably take the special train to Scarborough, being for such a distance at such a price; and therefore we think that the county court judge was justified in law in holding that the plaintiff might charge the defendants with the cost of the special train.

We do not say that, in every case of a passenger missing a train in correspondence with that in which he is, though he miss it by the default of the company's servants, he is therefore entitled immediately to take a special train for any distance at any cost, or that a judge or jury would be bound to allow in every case, or justified in allowing in every case, for the cost of a special train. The question must always be whether it was a reasonable thing to do, having regard to all the circumstances. Where to take a special train is a reasonable thing to do, we are of opinion that it is a sufficiently natural result of the breach of contract to bring it within the legal rule.

We are of opinion that the judgment appealed against was substantially correct, and that the appeal must be dismissed, with costs.

Appeal dismissed, with costs.

Feb. 16. Against this judgment the defendants appealed. *Herschell, Q.C.*, and *Webster*, for the defendants.

Russell, Q.C., and *Crump*, for the plaintiff.

The following authorities were cited in addition to those 304] cited *below: *Phillips v. Clark* (1); *Grill v. General Iron Screw Collier Co.* (2).

Cur. adv. vult.

May 10. The following judgments were delivered:

CLEASBY, B.: In this case the plaintiff had taken a railway ticket at the defendants' station at Liverpool for a journey from Liverpool to Scarborough. Some portions of the line belonged to the defendants, but other portions of the line belonged to other companies.

According to the time tables the time for the starting of the train from Liverpool was 2 p.m., and for arrival at Scarborough, 7.30. The time for arrival at Leeds was 5

(1) 2 C. B. (N.S.), 156; 26 L. J. (C.P.), 168.

(2) Law Rep., 1 C. P., 600.

o'clock, and the train to carry the plaintiff on to Scarborough left Leeds at 5.20. But the train was twenty-seven minutes late at Leeds, arriving at 5.27, and the train for Scarborough had then left. The plaintiff proceeded by the next train to York, and finding that the next train for Scarborough would arrive at 10 o'clock, he took a special train, by which he arrived at Scarborough between 8.30 and 9 o'clock. The cost of the special train was £11 10s., and the action was brought in the county court, the plaintiff recovering as damages the £11 10s. expended in completing the journey as before mentioned.

The principal question argued before us was the effect of the conditions referred to in the railway ticket which formed part of the contract of carriage.

These conditions, so far as the present question is concerned, were in these terms:

"The arrival time denotes when the trains may be expected, but the passengers to insure being booked should be at the principal stations five minutes earlier, and the intermediate stations ten minutes earlier. The doors of the booking-office will be closed punctually at the hours fixed for the departure of the trains, after which no person can be admitted.

"Time Bills. The published train bills of the company are only intended to fix the time at which passengers may be certain to *obtain their tickets for any journey [305 from the various stations, it being understood that the trains shall not start before the appointed time. Every attention will be paid to insure punctuality as far as it is practicable, but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. The right to stop the trains at any station on the line, though not marked as a stopping station, is reserved. The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party."

It was argued on behalf of the defendants, that the effect of these conditions was to exempt them from responsibility

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in respect of the trains not arriving at the time specified. The plaintiff contended that, taking the whole together, they were not absolved from the consequences of delay if it could be attributed to any want of attention on their part to insure punctuality.

It appears to me that the only reasonable construction of these conditions is, that the defendants undertake no responsibility whatever in relation to the arrival of trains at particular times to meet other trains. The language must be considered with reference to the subject-matter to which it relates, viz., arrival of trains, and the defendants may be well understood to say, such are the uncertain exigencies of traffic requiring trains sometimes much heavier than at other times, so uncertain are the times occupied in the letting passengers out with all their luggage, and taking them in (all which is inevitable unless there are to be great disappointments), and so many other causes such as the state of the rails, fogs, very high winds, &c., affect the times of arrival that we do not accept any responsibility for delay beyond the times advertised. The times are advertised, for convenience, at which we expect and have a right to expect 306] from our arrangements that the *trains will arrive, but we do not bind ourselves that they shall do so. The words are: "The directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention." No language can possibly be clearer or more free from ambiguity than this, and it is the language expressly directed to what their responsibility or contract is.

It appears to me that it would be unreasonable to read this clear language of contract as controlled by the vague assurance given before that every attention will be given to insure punctuality so far as it is practicable. No one would think of entering into so indefinite a contract, and for the same reason it ought not to cut down a contract clearly expressed.

Indeed, to hold the language of exemption as only applicable when there had been no want of attention to insure punctuality would practically deprive the defendants of the benefit of it, by compelling them to satisfy the severest test of opinion as to what might possibly have been done to produce a result which practically cannot be made certain. Their position would be hopeless if they had in every case of delay to make out satisfactorily that every such attention had been paid.

A break down might take place on the line, and it might be traced to some negligence of the company's servants in not shunting or signalling properly, and the consequence would be that every passenger in the train which followed would have a cause of action for being delayed beyond the time.

I must say that it appears to me that there is no binding contract as to the particular time of arrival, either as an absolute contract, or a contract that every attention should be paid to insure it, which is all we have to consider in the present case.

The contract of carriage would continue, involving certain obligations on the part of the carriers in carrying it into effect fairly and reasonably both as regards time and other matters, but we are not dealing with the general question, but only with the question whether they are responsible in respect of the times mentioned in the tables not being kept, and for the reasons given I am of opinion that they are not.

*This makes it unnecessary to consider the other [307 question discussed before us, viz., whether the expenses of the special train could be properly recovered. But, without saying that in no case whatever could the traveller charge the expense of a special train as part of his damages, I feel justified in expressing my opinion that every person disappointed through some default of the company in catching a particular train would not be entitled, as a matter of law, to reinstate himself as nearly as he could by means of a special train, and if the county court judge acted upon the view that in general he would be entitled to do so, I think he would have been wrong, and I can suggest no better guide upon the question of damage than that given in the judgment of Lord Justice Mellish. For the above reasons it appears to me that the judgment already given should be reversed.

JAMES, L.J.: I am of opinion that the company are not entitled to strike out from the contract the words, "But every attention will be given to insure punctuality so far as it is practicable," and to treat this as a mere vague assurance having no legal operation, involving no legal responsibility, but only a responsibility to public opinion, to be enforced by letters to the Times or a local journal.

I agree, however, that it is to be read in connection with the very clear stipulations that the company are not to be accountable for any loss, inconvenience, or injury which may arise from delays or detention.

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It appears to me that the whole sentence is capable of a reasonable and consistent legal operation.

The contract is to be read as if it were a contract made with regard to that particular train on that particular day, just as if somebody else, not the company, had made for that day arrangements enabling them to take passengers from Liverpool to Scarborough.

The company might reasonably stipulate that it would not be answerable for any delay occasioned by anything on the line, any block at a station, any break down of any other train, or any of the innumerable accidents which do occur, and must occur constantly on every line of traffic. 308] But, at the same time, it might *well promise and undertake that, so far as regarded that particular train, or that particular journey, every attention would be given to insure punctuality.

If we consider the immense extent and complication of a modern railway system and network in England, it would be most unreasonable to put a construction on such a document as the one before us, which would enable any passenger delayed anywhere to put the whole traffic arrangements, and the conduct of the whole railway staff, on its trial before a judge or jury. It is quite possible, and not improbable, that the negligence or blunder of officials in London or at Carlisle, of the guard of a goods train, a pointsman, or signalman, might derange the traffic so as to cause a block or delay on a branch line hundreds of miles away. And, to my mind, it is not to be endured that for such a negligence as that the company is to be liable to every passenger everywhere delayed by it.

Again, it appears to me that the company must be at liberty to accept any traffic brought to it, a special train for the Queen or a royal visitor, to accept an army of volunteers or excursionists, although it thereby disabled itself later in the day from keeping the times mentioned in its time tables. But if we read the contract *reddendo singula singulis* as applicable and limited to each particular train for each particular journey, then we can reasonably construe the statement in the conditions as a promise that the persons having the control and management of that train for that journey, will pay every reasonable attention, so far as it is practicable for them, to insure punctuality, viz., that they will not be guilty of wilful delay or reckless loitering. I am of opinion that there was some evidence before the county court judge to justify a conclusion that there was such wilful delay.

In the time tables a margin of fifteen minutes was allowed at Manchester. Now, according to the regulations, every person minded and entitled to go on from Manchester by that train ought to have been with his luggage on the platform, ready to start at 3.20, and it does appear to me, as it did to the county court judge, that if proper attention had been then and there paid to insure punctuality, the passengers getting out at Manchester would have been immediately got out, and the passengers getting in would have been got in without a minute's delay, and if this had been *done the further delays between Manchester and [309 Leeds would in all probability have been avoided; for we all know that the want of punctuality of a train in the early part of its journey is almost invariably followed by disarrangements and further delays in the further prosecution of its journey. But I am not satisfied that in dealing with that question of fact, viz., whether there was a breach of the contract, the county court judge rightly construed the contract or rightly apprehended what would be a breach of it. I am not satisfied that he put the question to himself in this way: Were the persons having the control and management and conduct of the train on that day guilty of wilful delay or reckless loitering?

With respect to the remaining question, whether the plaintiff was entitled to take the special train, I certainly should not myself have arrived at the same conclusion as the county court judge. I agree that the general rule is that a person with whom a contract has been broken has a right to fulfil that contract for himself as nearly as may be, but he must not do this unreasonably or oppressively as regards the other party, or extravagantly. I should myself have held it most unreasonable and oppressive for the plaintiff to have taken a special train merely to get in an hour earlier at the terminus of his journey on theseaside. And I think it must be taken that the county court judge did consider the dictum of Mr. Baron Alderson as establishing it as a rule of law that the plaintiff was, and that every other passenger for Scarborough by that train would have been, entitled to save himself the discomfort and ennui of an hour's detention at York, by taking a special train for Scarborough.

I am of opinion that the matter must go back for a new trial.

MELLISH, L.J.: This was an appeal from a judgment of the Common Pleas Division, affirming a judgment of the county court judge sitting at Bloomsbury, special leave having been given to appeal to us. The action in the county

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court was brought by the plaintiff, Mr. Le Blanche, against the London and North Western Railway Company, to recover £11 10s., the cost of a special train which the plaintiff engaged to carry him from York to Scarborough, on account 310] of his having arrived too late at York *for the train which leaves York at 6.5 for Scarborough, through, as he alleged, the neglect of the defendants in not properly performing their contract with him to convey him from Liverpool to Scarborough. It was held by the judge of the county court that the plaintiff was entitled to recover the cost of the special train. The plaintiff, on the 16th of August, 1874, took a first-class ticket at the defendants' station at Liverpool by a train which left Liverpool at 2 p.m., and, according to the time tables, was expected to arrive at Manchester at 3.5, to leave Manchester at 3.20, to arrive at Leeds at 5.0, to leave Leeds at 5.20, to arrive at York at 6.5, and at Scarborough at 7.30. The train was fifteen minutes late when it left Manchester, and twenty-seven minutes late when it arrived at Leeds, and consequently the plaintiff was too late to go on to York by the train which left Leeds at 5.20. The plaintiff left Leeds by the next train, and arrived at York at 7 p.m. The next train which left York for Scarborough started at 8 p.m., and was timed to arrive at Scarborough at 10 p.m. The plaintiff thereupon took a special train from the North Eastern Railway Company and arrived at Scarborough between 8.30 p.m. and 9 p.m. Three questions were argued before us, on which it is necessary that we should give an opinion: First, was there any contract on the part of the defendants that they would use reasonable exertions to insure punctuality, so that the train might arrive at Leeds in time for the train which was to leave Leeds for York at 5.20? Secondly, if there was, was there any sufficient evidence that the contract had been broken, and that it was through the fault of the defendants that the train arrived so late at Leeds; and, thirdly, was the plaintiff entitled to recover the cost of the special train? Now, with respect to the first question: the ticket issued to the plaintiff had indorsed upon it the words, "Issued by the London and North Western Railway Company; subject to the company's regulations and to the conditions in the time tables of the respective companies over whose lines this ticket is available," and it was admitted in the argument before us by the counsel on both sides that the conditions annexed to the company's time tables formed part of the contract between the plaintiff and the defendants. These conditions were as follows: [His Lordship then read the conditions.]

*We have, therefore, to consider what is the true [311 effect of these conditions.

On the part of the plaintiff it was argued that the reference to the time tables in the ticket might, independently of the conditions, make the company absolutely liable for the non-arrival of the trains at the specified times, and that the only effect of the conditions was to free the company from such absolute liability, but that they still remained liable for a non-arrival of this train caused by their own negligence. On the other hand, it was contended, on the part of the defendants, that the effect of the conditions was to free them from all liability in respect of the non-arrival of their trains in proper time, whatever might be the cause which occasioned the delay, and that the words, "Every attention will be paid to insure punctuality as far as practicable," formed no part of the contract, or, if they did form part of the contract, that their meaning was that the company would make proper regulations to insure punctuality, but that nevertheless the company were not to be liable for any neglect on the part of their servants in carrying out those regulations. Now it is to be remembered that the language of the conditions is the language of the company, that the conditions are imposed by them, and that they are seeking to put a construction on the conditions the effect of which will be to free them from a liability which the law unquestionably, in the absence of an express agreement to the contrary, imposes on them, namely, a liability to be answerable for the negligence of their servants. Under these circumstances, I think that the conditions are to be construed, so far as they are ambiguous, against them; that the words, "Every attention will be paid to insure punctuality as far as practicable," must be treated as part of the contract, and as modifying every other statement contained in the conditions.

If the language had been,—“the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be answerable for any loss, inconvenience, or injury which may arise from delays or detention, but every attention will be paid to insure punctuality as far as practicable,” the construction would have been clear, and I do not think it really matters which clause of the sentence comes first.

*I also think that this construction is confirmed by [312 comparing the terms in which the company speak of their liability for what may happen on their own line with the

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terms in which they speak of their liability for what may happen on the lines of other companies.

In the last clause of the conditions they say the company do not hold themselves liable for any delay or detention arising from acts or defaults of other parties.

Why do they not say, in equally plain terms, that the company do not hold themselves liable for any delay or detention arising from their own act or default if that is what they meant?

I also think that there is no valid ground for the distinction contended for by Mr. Herschell between the regulations made by the company and the mode in which those regulations are carried out by the servants of the company. If they are liable at all for negligence in not insuring punctuality, they must be as liable for the negligence of the servants of the company in carrying out the regulations as for the negligence of the directors in not making proper directions. I am, therefore, of opinion that the contract for which the plaintiff contends was sufficiently proved.

I have next to consider whether there was sufficient evidence that the contract was broken, and that by reason of that breach the plaintiff did not arrive at Leeds in time for the train at 5.20.

Both the county court judge and the judges of the Common Pleas Division have elaborately examined the evidence respecting the different acts of neglect imputed to the defendants, and I think it sufficient to say, on this part of the case, that I agree in the conclusion they have arrived at, and the reasons they have given for it.

I think that the fact of the train being a quarter of an hour late when it left Manchester made it necessary for the defendants to give some explanation respecting the cause of the delay, and that it is impossible to lay down as a matter of law that the county court judge was bound to be satisfied with the explanation given by the guard, even assuming that he believed everything the guard said. I think that there was evidence from which he might properly come to 313] the conclusion that it was through the neglect of *the company that the train was a quarter of an hour late at Manchester, and that this was the cause of the plaintiff losing his train at Leeds. Lastly, I have to consider whether the plaintiff was entitled to recover as special damages the cost of the special train from York to Scarborough.

Now, I agree that, as a general rule, what is said by Al-

derson, B., in *Hamlin v. Great Northern Ry. Co.* (¹), is correct, namely: "The principle is, that if the party does not perform his contract the other may do so for him as near as may be, and charge him for the expense incurred in so doing." I agree also with what is said by the judges of the Common Pleas Division, that this rule is not an absolute one applicable to all cases, and that the question must always be whether what was done was a reasonable thing to do having regard to all the circumstances. This, however, is a very vague rule, and it is desirable to consider whether any more definite rule can be laid down. Now, one mode of determining what, under the circumstances, was reasonable, is to consider whether the expenditure was one which any person in the position of the plaintiff would have been likely to incur if he had missed the train through his own fault, and not through the fault of the railway company. The rule that what is reasonable under particular circumstances may be discovered by considering what a prudent person, uninsured, would do under the same circumstances, is applicable to many cases besides those which arise under policies of marine insurance.

I think that any expenditure which, according to the ordinary habits of society, a person who is delayed in his journey would naturally incur at his own cost, if he had no company to look to, he ought to be allowed to incur at the cost of the company, if he has been delayed through a breach of contract on the part of the company, but that it is unreasonable to allow a passenger to put the company to an expense to which he could not think of putting himself if he had no company to look to. The question, then, in my opinion, which the county court judge ought to have considered is, whether, according to the ordinary habits of society, a gentleman in the position of the plaintiff, who was going to Scarborough for the purpose of amusement, and who missed his train at York, *would take a special [314 train from York to Scarborough at his own cost, in order that he might arrive at Scarborough an hour or an hour and a half sooner than he would do if he waited at York for the next ordinary train. This question seems to me to admit of but one answer, namely, that no one but a very exceptionally extravagant person would think of taking a special train under such circumstances. I am of opinion, therefore, that the county court judge did not act on the proper principle in considering the question of damage; and

(¹) 1 H. & N., 408; 26 L. J. (N.S.), (Ex. Ch.), 20 at p. 22.

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that unless the parties consent to the damages being reduced to 1s., there ought to be an order for a new trial.

I think each party should pay his own costs of the appeal to the Common Pleas Division, and of the appeal to us.

BAGGALLAY, J. A.: The action in this case was brought in the Bloomsbury county court, to recover from the defendants the sum of £11 10s., being the amount paid by the plaintiff for a special train from York to Scarborough, under the following circumstances. On the afternoon of the 18th of August, 1874, the plaintiff took a through ticket at the defendants' station in Liverpool for the journey from that town to Scarborough; on the ticket was an indorsement in the following terms: "Issued by the London and North Western Railway Company, subject to the company's regulations and to the conditions in the time tables of the respective companies over whose lines this ticket is available."

The only regulation of the company to which it appears material to refer, other than those included in the time table conditions, is that which prohibits the driver of any train from making up lost time by increase of speed. This appears to have been a regulation of the company, from the evidence of the guard, as stated in the case. The conditions in the time table, so far as they are material for the purposes of the present case, are in the following terms:

"The arrival time denotes when the trains may be expected, but the passengers, to insure being booked, should be at the principal stations five minutes earlier, and the intermediate stations ten minutes earlier. The doors of the booking-office will be closed punctually at the hours fixed for the departure of the trains, after which no person can be admitted.

315] *"Time Bills. The published train bills of the company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations, it being understood that the trains shall not start before the appointed time. Every attention will be paid to insure punctuality as far as is practicable, but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. The right to stop the trains at any station on the line, though not marked as a stopping station, is reserved. The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of

the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, and for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party."

Before proceeding to a consideration of the purpose and effect of these regulations and conditions, and of the contract by which the defendants became bound by their issuing to the plaintiff a through ticket, it will be convenient, and I think necessary, to examine somewhat minutely the general circumstances of the traffic to which they were made applicable. And, first, it is to be noted that the railway from Liverpool to Scarborough, though continuous, did not belong wholly to the defendants, nor was it worked throughout by the defendants, nor even by continuous trains. From Liverpool to Leeds the line was worked by the defendants, and from Leeds to York and from York to Scarborough by the North Eastern Railway Company; again, the line from Liverpool to Leeds which was worked throughout by the defendants, did not belong wholly to them, though they had running powers over those portions of the line of which they were not the owners; portions of the line, in fact, belonged to three other companies—the Lancashire and Yorkshire, the Manchester, Sheffield and Lincolnshire, and the Midland—and these several portions of the line between Liverpool and Leeds formed parts of other systems more or less connected with the [316] through line. Between Liverpool and Leeds there were no less than seven changes in the ownership of the line. In addition to this, several of the principal stations on the line, including those at Manchester and Staleybridge Junction, belonged to other companies, whose servants regulated the admission into such stations of the defendants' train. It is obvious to how many possible causes of accidental delay a through train passing over the line between Liverpool and Leeds was subject, and it is not immaterial to observe that in so complicated a system a delay of very trifling duration in its origin might, in the result, occasion one of very considerable importance.

The train by which the plaintiff travelled left Liverpool at three minutes after 2 p.m., being three minutes later than the time fixed for its departure as published on the defendants' time bills; its time for arriving at Leeds, as published on the same time bills, was 5 p.m.; and it also appeared,

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from the same bills, that a train of the North Eastern Company was timed to leave Leeds for York at 5.20 p.m., reaching that city in time for a corresponding train to Scarborough, which would be due at Scarborough at 7.30 p.m.

The train from Liverpool did not, in fact, reach Leeds until 5.27, when the North Eastern Company's 5.20 train had left for York, and the plaintiff was consequently delayed at Leeds until 5.55, when the next train left for York; and on his arrival at York at 7 p.m. there was no train leaving for Scarborough earlier than 8 p.m., and that train would not be due at Scarborough until 10 p.m. The plaintiff thereupon took a special train from York to Scarborough, arriving at Scarborough between half-past 8 and 9 o'clock; for this special train he paid £11 10s. to the North Eastern Company, and then commenced the present action against the defendants to recover the amount so paid.

It was admitted by the plaintiff, and by his counsel, that he had not any business or engagement whatever at Scarborough necessitating his arrival there at any particular time, and that he had, in fact, taken the special train for the purpose of raising the question whether a passenger was, under such circumstances, entitled to do so. On the [317] part of the plaintiff it was contended *that, by the acceptance from him of the full fare from Liverpool to Scarborough, and the issue to him of a through ticket, the defendants became bound to make all reasonable efforts to insure the arrival of the train at Scarborough by 7.30 p.m., and rendered themselves liable for its non-arrival there at that time, unless the delay was occasioned by some cause other than the default or negligence of the defendants or their servants; that the delay in arriving at Leeds, which was the substantial cause of the plaintiff's not arriving at Scarborough by the train timed to arrive there at 7.30, was in fact caused by the default or negligence of the defendants or their servants; and that inasmuch as, in consequence of such delay, the plaintiff was unable to proceed to Scarborough by the train due there at 7.30, he was not bound to wait for the next train, which would not arrive there before 10, but was entitled to take a special train and to charge the cost of it to the defendants.

For the defendants, on the other hand, it was contended that this was not the true effect of the contract; that whatever might have been the cause of the non-arrival of the train at Leeds at the time specified in the time bills, the defendants would have been protected by the conditions from liability in respect of such delay, or, at any rate, that they

could not have been liable unless the delay had arisen from some wilful default or negligence on their own part, or on that of their servants; and that, inasmuch as there had not, in fact, been any such wilful default or negligence, they were under no liability to the plaintiff; and, further, that in any view of the case, the plaintiff was not justified in taking a special train, and was not entitled to recover the costs of it from the defendants.

The decision of the judge of the county court was in favor of the plaintiff, and he ordered payment to him by the defendants of the £11 10s., and of the costs of the action, reserving leave to the defendants to move the court above; on appeal to the Court of Common Pleas, the order of the county court was affirmed; and against the order so affirmed, the present appeal is brought, leave having been granted by the Court of Common Pleas for that purpose in consideration of the great importance of the case, not only to railway companies, but to the public generally.

*Three questions have been raised in the argument [318 before us: first, what was the true purport and effect of the contract by which the defendants became bound by the issue to the plaintiff of a through ticket from Liverpool to Scarborough; secondly, were the defendants guilty of a breach of such contract; and, thirdly, upon the assumption that they were so guilty, was the plaintiff entitled to take a special train and to charge the cost of it to the defendants. The first question resolves itself into a consideration of the proper construction to be put upon the conditions contained in the time bills.

Now, omitting from present consideration the earlier conditions, which have reference to the booking of passengers and the starting of trains, and which appear to affect the question of breach of contract, rather than that of the construction of the contract, we have in effect to deal with two series of conditions—the one general in their terms, the other limited to carriage between a station on the defendants' line and a station on another company's line.

In approaching the consideration of the true effect and meaning of these conditions, we must, I think, bear in mind the circumstances under which, and the species of traffic to which, they were intended to be applicable. These I have already pointed out, and it is unnecessary for me further to advert to them.

- The first series of conditions commences with the statement that "every attention will be paid to insure punctuality so far as it is practicable," and this statement is followed

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(amongst other stipulations) by a notice that the company will not undertake that their trains shall start or arrive at the times specified in the time bills, and that the company will not be accountable for any loss, inconvenience, or injury which may arise from delays or detention. Now, in construing this first series of conditions, I think it quite immaterial whether the later words are to be regarded as moderating the effect of the earlier undertaking to pay every practicable attention to secure punctuality, or the earlier statement is to be regarded as governing or modifying the absolute terms of the subsequent paragraphs. In either view of the case they must, I think, be construed as a whole; and if so construed, they, in my opinion, so far 319] as they affect the present *question, amount to this: that the defendants will use every endeavor, consistently with the ordinary and reasonable use and working of the line, to insure punctuality, but that they will not hold themselves responsible for delay in arriving at any particular station, when that delay has arisen from causes over which they have no control, or which, being incidental to a reasonable working of the line, are practicably unavoidable. Such, for instance, as an unexpected delay in admission into a station under the control of another company, or an unusual accession of passengers or goods, which last-mentioned circumstance must almost of necessity occasion delay in the starting of a train, and consequently in its arrival at its destination, especially when, under the regulations of the company, as in the present case, the doors of the booking-office are not closed until the time fixed for the departure of the train, and the driver of the train is not allowed to make up for lost time by extra speed. These regulations have been made for the convenience and protection of the public, but are such as cannot fail to lead to occasional, or even frequent, delays.

If we pass now to an examination of the second series of conditions we find that they are introduced by the following words: "The granting of tickets to passengers off the company's line is an arrangement made for the convenience of the public;" and that they in terms protect the defendants from responsibility in respect of three several subject-matters, all incidental to a traffic between stations on the line worked by the defendants and stations on lines worked by other companies. These three subject-matters are, 1st, delay, detention, or other loss or injury arising off the lines of the defendants or from the acts or defaults of other parties; 2dly, the correctness of the times over the lines of the other

companies ; and, 3dly, the arrival of the defendants' trains in time for the nominally corresponding trains of other companies. It is with the third only of these subject-matters that we have at present to do.

Now I do not think that the contention or suggestion of the defendants, that the effect of this condition was to free them wholly from responsibility in respect of the non-arrival of their trains in time to meet the corresponding trains of other companies, whatever might be the cause of the delay, can be maintained ; to so construe the condition would be, in my opinion, to ignore the *introductory words [320 which indicate that the object of the condition which follows was to protect the defendants from the consequence of an act done for the convenience of their passengers, and not to relieve them from any liability to which they would have been otherwise subject by reason of their issuing a through ticket to any place off their line. It appears to me that the fair and reasonable interpretation to put upon the conditions is this : that they protect the defendants against being subjected, by reason of their issuing a through ticket to any place off their line, to any additional responsibility beyond what they would have been subject to if they had issued a ticket to the furthest point of their own line, and had left the passenger to take a fresh ticket to his ultimate destination. Such a condition does not appear unreasonable ; by issuing a through ticket to his ultimate destination beyond their line the defendants relieve the passenger from the trouble and delay and possible detention which would have been occasioned by his having to take a fresh ticket, and having done this for his convenience, they might fairly claim to be exempted from any additional liability arising out of such act.

If this be the correct construction of the time table conditions, it will follow that the liability of the defendants in respect of the non-arrival of their train at Leeds in time to meet the corresponding train to York, is the same as it would have been if they had issued to him a ticket to Leeds only, and their train had arrived there at 5.27 instead of at 5, and, as has been pointed out in considering the first series of conditions, the defendants would have been under no liability in respect of such delay if it had been occasioned by causes over which they had no control, or which were incidental to a reasonable working of the line.

It appears to me that neither by the county court judge nor by the Court of Common Pleas has sufficient effect been

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attributed to that which I have ventured to term the second series of conditions, and which, as it appears to me, were intended to secure to the defendants a further protection against liability, in respect of contracts of carriage to places off their own lines, beyond that to which they were entitled under the first series of conditions in respect of contracts of carriage to places on their own lines.

Now, if according to the true effect of the contract the 321] liability *of the defendants to the plaintiff in respect of delays or detention was limited to that to which they would have been subjected if they had issued a ticket to Leeds only, it becomes immaterial in the present case to consider the cause of the delay in arriving at Leeds, inasmuch as, upon the assumption of the defendants having been guilty of a breach of their contract, the plaintiff could have only recovered nominal damages, it being admitted that he had not sustained any pecuniary damage or been put to any expense by reason of the delay in arriving at Leeds, other than that occasioned by his taking the special train, in respect of which, as I purpose showing presently, he would not, in my opinion, have been entitled to make any demand upon the defendants.

As, however, some of the members of the court take a different view from that which I have expressed of the purport and effect of the contract, and are of opinion that according to its true purport and effect the defendants were bound to make all reasonable efforts to insure the arrival of the train at Scarborough by 7.30 p.m., I think it right to express my opinion upon the other two questions which have been raised in the course of the argument, viz., whether the defendants have been guilty of a breach of such contract, and if so, whether the plaintiff was justified in taking a special train and could charge the cost of it to the defendants. Now the question of breach is one entirely depending upon the evidence in the case, and I am of opinion that unless the county court judge, in dealing with the evidence, had acted upon any wrong view of the law equivalent to a misdirection of the jury, had the case been tried by a jury, his decision in this respect ought not to be interfered with. From the statements in the case I gather that it was established to the satisfaction of the county court judge that there was unreasonable delay; that there were no unusual circumstances justifying or excusing such delay; that in more than one instance delay was occasioned by a want of attention to insure punctuality, and

that upon the whole there was negligence on the part of the defendants. If these general views had not been modified by anything else appearing upon the judgment of the county court judge, they would have been sufficient to support his decision that the defendants had committed a breach of their contract, and with such decision I should not have thought it right to interfere; but *it appears from the case [322 that when the judge expressed his opinion that the delay had been occasioned by a want of attention on the part of the defendants to insure punctuality, he proceeded to mention, as an instance of such want of punctuality, the keeping the doors open to the last moment at Liverpool. Now it is quite true that if the passenger is allowed to book up to the time fixed for the departure of the train, the train cannot start punctually, and delay must be occasioned; but it appears to have escaped the notice of the learned judge that this practice formed the subject of one of the conditions by which the plaintiff was bound, and I am unable to see how this can be regarded as a want of attention on the part of the defendants or their servants to insure punctuality. It is impossible to determine how much of the subsequent delays were occasioned by the first delay at Liverpool. Under these circumstances, I do not think that the finding of the judge as to the question of breach should be regarded as conclusive; and the more so as, in my opinion, no one of the causes of delay mentioned in the case can be fairly considered as having arisen otherwise than from causes beyond the control of the defendants, or which were incidental to the reasonable working of their railways. But, assuming the county court judge to have been right in considering that the defendants had been guilty of a breach of the contract of carriage entered into by them, the question remains whether the plaintiff was justified in taking the special train and charging the cost of it to the defendants. Upon this branch of the case certain dicta of Baron Alderson, in the case of *Hamlin v. Great Northern Ry. Co.* (¹), have been much relied upon on the plaintiff's behalf, and these dicta apparently formed the chief grounds of the decision of the county court judge. In that case a tradesman had taken a ticket from London to Hull, and on his arriving at Grimsby there was no train by which he could proceed that night to Hull, as, according to the published time tables of the company, there ought to have been. He accordingly slept at Grimsby, and in the morning paid 1s. 4d. for his fare to Hull. In consequence of the delay he failed to keep ap-

(¹) 26 L. J. (N.S.) (Ex. Ch.), 20.

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pointments with his customers, and, being detained for several days, was put to considerable expense. It was held that though he would have been entitled to have performed 323] *the contract at the expense of the company, yet, as he had not done so, he was not entitled to recover anything more than nominal damages in addition to the 1s. 4d. In my opinion, the decision in the case of *Hamlin v. Great Northern Ry. Co.* ('), affords no support to the plaintiff's argument; but in the report in the Law Journal, Baron Alderson is stated to have made the following observations in the course of the argument: "The plaintiff might have taken a post-chaise, and charged it;" and again, "The principle is, that if the party does not perform his contract, the other may do so for him, as near as may be, and charge him for the expense of so doing."

Now I think that these observations of Baron Alderson, which do not appear in the report of the case in Hurlstone & Norman ('), must be considered as having been made with reference to the particular case then before the court, and not as intended to lay down an absolute principle applicable to all cases, however different in their circumstances. Having regard to the circumstances of that case, as detailed in the reports, it would have been a very reasonable course for the plaintiff to have pursued to have taken a post-chaise from Grimsby to Hull, so as to secure his arrival there that night, which he could not otherwise have done. But I cannot think that the learned Baron would have considered the principle which he then enunciated as having application to a case like the present. The view taken by the Court of Common Pleas in the present case of the true meaning and effect of the dicta of Baron Alderson, differs from that adopted and acted upon by the county court judge, though it led the court to the same conclusion. Mr. Justice Brett, in delivering the judgment of the court, is reported to have said: "We think that the rule attributed to Mr. Baron Alderson in *Hamlin v. Great Northern Ry. Co.* (') is a good expression of the law. We think it may properly be said that if the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing."

This appears to me to be a more correct enunciation of the principle applicable to such cases than the particular words attributed to Baron Alderson.

324] *The question, then, in the present case is, whether

(') 1 H. & N., 408; 26 L. J. (N.S.) (Ex. Ch.), 20, at p. 22.

the taking a special train was a reasonable thing for the plaintiff to do under the circumstances. Now it appears to me that the course pursued by the plaintiff was most unreasonable and oppressive, bearing in mind the fact that he had not any business or other engagement at Scarborough necessitating his arrival there at any particular time, and that he admittedly took the special train for the purpose only of testing whether he could charge the expense of it upon the company.

I quite concur in the view upon which the Court of Common Pleas appears to have proceeded, that *prima facie* the question whether the course pursued by the plaintiff in the present case was reasonable was one for the decision of the county court judge, and if he had acted upon the principle as enunciated by the Court of Common Pleas, I should have felt that his decision ought not to be interfered with; but it is clear from the statement of his judgment in the case, that the county court judge considered the principle enunciated by Baron Alderson as absolute and applicable to all cases, and that it was binding upon him in the present case; and that he did not exercise his judgment, as in my opinion he ought to have done, for the purpose of determining whether the course pursued by the plaintiff was reasonable or not.

For these reasons I am of opinion that, even if the true effect of the contract by which the defendants were bound was, that they would make all reasonable efforts to insure the arrival of the train at Scarborough by 7.30, and if the defendants can properly be considered as having been guilty of a breach of such contract, yet that the assessment of damages, as made by the county court judge, ought not to stand, and that there should be a new trial.

I have only to add that if the interpretation which I think should be put upon the contract is the correct one, and if the liability of the defendants in respect of non-arrival of the train at Scarborough is limited to the liability to which they would have been subjected if the plaintiff had taken a ticket to Leeds only, intending to proceed by the 5.20 train to York, it appears to me perfectly clear that he would not have been entitled, whether his business was urgent or not, to take a special train, and to charge the defendants with the cost of it.

*The principle enunciated by Baron Alderson in [325 *Hamlin v. Great Northern Ry. Co.* (*)] has no application to such a case as that which we are now considering; it

(*) 1 H. & N., 408; 26 L. J. (N.S.) (Ex. Ch.), 20, at p. 22.

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has application only to cases in which the act is done and the expense incurred to enable the contract to be performed, and not to cases in which damages consequential upon the breach are claimed. If this case is sent back to the county court judge for a new trial, or if similar cases should hereafter arise, I think the rule suggested by Lord Justice Mellish would prove a safe guide for determining what steps may with propriety be taken by a railway passenger for securing the performance, as near as may be, of the contract of carriage entered into with him by a railway company.

MELLOR, J.: I have had the advantage of reading the judgments prepared by the other members of the court, and, inasmuch as I agree entirely with the view of the facts of this case as expressed by Lord Justice Mellish in the judgment prepared by him, I think it unnecessary to write or deliver a separate opinion; but I think that the judgment of the Common Pleas is erroneous in so far that it dismissed the appeal of the defendants, and with costs.

I think that a new trial ought to have been directed as to the mode upon which the damages were assessed. It appears that there must be a new trial, as this court has no power to reduce the damages to 1s. unless the petitioner will consent to their being reduced, and I think that in such case there should be no costs on either side.

Judgment reversed.

Solicitors for plaintiff: *Argles & Rawlins.*

Solicitor for defendants: *Roberts.*

See 2 Redf. on Railways (5th ed.), 276, 280, part III, § 201.

In an action against a carrier of passengers, to recover damages for a failure to carry the plaintiff, within the appointed time, to the place for which he had taken passage, by reason whereof he did not perform his errand there, and was detained at expense, and to the injury of his business at home, he must produce some evidence that if he had arrived at the appointed time he might have done his errand and would have promptly returned, or that he could not with due effort accomplish his errand by reason of his delay in arriving. Nor can the plaintiff, in such action, recover his expenses and the damages to his business during a sojourn of several days, without some proof as to the time

when he first ascertained that he could not accomplish his errand, and might, therefore, return.

The fact that his errand was to receive a loan of money, previously promised to him, and that, not receiving it, he was without money for the expenses of returning until he received it from home, is not enough to show a necessity for delaying his return, if he made no effort to borrow, and does not show that there was any difficulty in his doing so: *Benson v. New Jersey, etc.*, 9 Bosw., 412.

Railroad corporations, by advertising the hours when trains will start, agree with holders of tickets that trains shall start at the hours named; but with an implied reservation to change the hours upon giving reasonable notice.

If the hours at which railroad trains will start have been advertised in public newspapers, it is not giving reasonable notice of a change of the hour of any particular train to post up handbills, announcing it at the stations and in the cars of the railroad corporation; and if no other notice is given, one who has bought tickets by the package, in advance, and in accordance with the advertisement has presented himself at the station to be carried before the appointed time for a train to start, without knowledge of the change, may recover damages for the injury sustained by him from the delay. And, in such case, the railroad corporation cannot exonerate itself by showing a usage on its part, for several years, to make occasional changes in the hour for certain trains to start, without other notice thereof than by handbills: *Sears v. Eastern, etc., 14 Allen (Mass.), 438.*

"The publication of a time table in common form imposes upon a railroad company the obligation to use due care and skill to have the trains arrive and depart at the precise moments indicated in the table; but it does not import an absolute and unconditional engagement for such arrival and departure, and does not make the company liable for want of punctuality, which is not attributable to their negligence.

"G. purchased of the M. & L. R. R. a season ticket from S., an intermediate station, to M. The railroad company published a time table, in common form, upon which a train was advertised as leaving L. at 8:27 a.m., leaving S. at 8:45, and arriving at M. at 9:35 a.m. G. was at S. depot in season to take this train, but the train ran by S. without stopping. In an action of assumpsit, brought by G. against the railroad company to recover damages for their failure to transport him seasonably to M., the railroad company offered to prove that the road was suitably equipped for transporting the usual travel and for accommodating the excess ordinarily to be anticipated from extraordinary occasions; that, on the morning in question, an extraordinary, unusual and unexpected number of persons appeared at L. to take passage, and

there, and at other stations before reaching S., so completely filled and overloaded the cars that it would have been dangerous to have admitted more passengers on the train; that at S. there were, besides the plaintiff, a large number of persons waiting for transportation, whom it would have been impossible to have taken into the already overloaded cars; that the railroad company could not have discriminated as to whom they would take or decline to take, even if they had had the means to transport any of them; that the train consisted of eighteen passenger cars and one baggage car, and that, if the train had stopped at that station, being on an up grade, it would have been impossible to have started it; that the railroad company had no reason to expect that such an unusual number of persons would apply for transportation on that morning; and that, on the arrival of the train at M., and as soon as the same could be done with safety to the travelling public, they sent back the train to S. to bring the plaintiff, and all other persons desiring transportation, to M.

"Held, that the railroad company were not liable, if they had done all that due care and skill could do to transport the plaintiff punctually; and that the proposed evidence was admissible, as tending to show that the failure to transport the plaintiff was not attributable to negligence on the part of the railroad company." *Gordon v. Manchester, etc., 52 N. H., 596.*

By arrangement, tickets were sold by two railroad companies to pass over each other's road. The train of each from different points arrived at and left a station at the same time on different sides of the same platform. A passenger in one train having such a ticket, arrived just as the other train was departing, passed over the platform, and stepped on the car of the other train; by its movement he was thrown off and injured. The court charged, "If the train was distinctly running on the track when the plaintiff attempted to enter, he was guilty of negligence and cannot recover." Held, to be error. It was for the jury to say whether the danger of boarding the train, when in motion, was so apparent as to make it the duty of

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the passenger to desist from the attempt.

The companies having an arrangement for through tickets, it was binding on both companies, and it was their duty to give a reasonable time for the transfer of passengers and their baggage. The conductor of the arriving train signalled the departing train that there were no passengers for it. The passenger was not responsible for the mistake; reasonable time should be allowed to ascertain whether there were passengers.

The company having wronged the passenger by the premature moving of

the train, in ascertaining whether he was negligent, he was not required to exercise the self-possession and coolness in determining the danger as a bystander or passenger in the car would have. Duties of connecting railroads stated: *Johnson v. West*, etc., 70 Penn. St. R., 357.

It is no defence to an action against a railroad company, for its failure to transport a passenger with proper dispatch, that the detention was the wilful act of a conductor in charge of the train: *Weed v. Panama*, etc., 17 N. Y., 362; note to *Wear Commissioners v. Adamson*, ante, p. 200.

[1 Common Pleas Division, 326.]

May 10, 1876.

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*SANDERS and Others v. STUART.

Damages—Remoteness—Failure to transmit telegraphic Message—Message in Cipher.

The defendant's business was to collect telegraphic messages for transmission to America and other places. The plaintiffs intrusted the defendant with a message in cipher, which was unintelligible to the defendant, for transmission to America. The defendant negligently omitted to send the message. The consequence was that the plaintiffs lost a sum of money which they would have earned for commission upon an order to which the message related:

Held, that the plaintiffs could not recover such sum of money from the defendant, but only nominal damages.

THE nature of the action⁽¹⁾ and the facts sufficiently appear from the judgment. A verdict having been entered for the plaintiffs for the amount claimed, a rule *nisi* had been obtained, in pursuance of leave reserved, to reduce the damages to such sum as the court should think fit.

April 26. *Butler* showed cause: The defendant ought, in the nature of things, to infer that the telegram, though in cipher, was one of importance, and that negligence in the transmission of it might lead to serious loss. The damages may consequently be said to have been in the contemplation of the parties within the meaning of the rules as to remoteness of damage. The true reason of the rule is, that the defendant may not be subjected to an amount of damages which he had no reason to expect, and as to which, consequently, he did not take the amount of precaution which he would have done if he had had notice.

The natural inference would be that a telegram sent to America was of great importance, for persons do not send

⁽¹⁾ It is unnecessary to set out the pleadings, as nothing turned upon the form of them.

trivial messages by telegraph to America. There was sufficient to put the defendant on inquiry, and if he chose to take the message without knowing what it meant, he must be taken to have made himself responsible for whatever damages might ensue. [He cited *Sedgwick on Damages*, 6th ed., p. 442; *Strasburgher v. Union Telegraph Co.* (reported in note in *Sedgwick on Damages*, 6th ed., p. 442); *United States Telegraph Co. v. Wenger* (').]

**Herschell*, Q. C., supported the rule: The plain- [327 tiffs can only recover nominal damages. The telegram being in cipher the defendant cannot be considered as having any such damages as these in his contemplation. The plaintiffs, therefore, cannot recover any damages that were not the result of his negligence according to the ordinary course of things. It cannot be said that the failure to send the message in the ordinary course of things would produce the damage now sought to be recovered.

The foundation of the rule as to damages is, that if damages not the natural result of the cause of action, i. e., the result of it in the ordinary course of things, are sought to be recovered, the defendant must have had sufficient notice of the probability of such damages ensuing. The rule recognizes the fact that in the course of human affairs negligence will occur; such negligence may be that of a servant and not the defendant's fault at all. The defendant is not to incur damages which may ruin him and for which the consideration may be quite inadequate, unless he has had such a notice as would give him the opportunity, if he wishes it, of taking more than the usual measure of precaution. [He cited *Playford v. United Kingdom Telegraph Co.* (*).]

Cur. adv. vult.

May 9. The judgment of the court (Lord Coleridge, C. J., Brett, and Lindley, J. J.) was delivered by

LORD COLERIDGE, C. J.: The plaintiffs in this case were merchants in this country; the defendant a person who made his living by collecting messages and transmitting them by telegraph to, amongst other places, America. He received from the plaintiffs for transmission to New York a message, in words by themselves, entirely unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving a large order for certain goods, on which the plaintiffs, if the order had been confirmed, would have earned a considerable commission. The defendant, through admitted negligence, did not transmit the

(') 55 Penns., 262.

(*) Law Rep., 4 Q. B., 706.

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Sanders v. Stuart.

message, and the plaintiffs admittedly lost thereby considerable profits which they would otherwise have made by the transaction.

328] *The action was for negligence in not transmitting the message; the verdict was for the plaintiffs, and the question arises as to the due measure of damages. The plaintiffs seek to retain the verdict for a sum intended to represent the loss or profit above mentioned. The defendant insists that such damages are not within the rule laid down in *Hadley v. Baxendale* ⁽¹⁾, and ever since approved of and acted on, and that in this case there is nothing to warrant a verdict for damages more than nominal. Upon the facts of this case we think that the rule in *Hadley v. Baxendale* ⁽¹⁾ applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion how the case might be if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason, the second portion of Baron Alderson's rule clearly applies. No such damages as above mentioned could be "reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it," for the simple reason that the defendant, at least, did not know what his contract was about, nor what, nor whether any, damage would follow from the breach of it. And for the same reason, viz., the total ignorance of the defendant as to the subject-matter of the contract (an ignorance known to, and, indeed, intentionally procured by the plaintiffs), the first portion of the rule applies also; for there are no damages more than nominal which can "fairly and reasonably be considered as arising naturally, i.e., according to the usual course of things, from the breach" of such a contract as this. No rule as to damages which is to be found in any of the cases, or in the books of Mr. Sedgwick and Mr. Mayne, will avail the plaintiffs in this case; and the cases cited to us from the American courts in which the liabilities of common carriers have been imposed on telegraph companies in America, even if correct with regard to telegraph companies, have no application to a case where the defendant is not a telegraph company, but a collector of messages to be transmitted by such a company, and the negligence complained of is his negligence and not the negligence of a company. We *think, therefore, that

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(1) 9 Ex., 341; 23 L. J. (Ex.), 179.

the rule should be absolute to reduce the damages to a nominal sum.

Rule absolute.

Solicitors for plaintiffs: *Stocken & Jupp*, for Radcliffe & Layton.

Solicitors for defendant: *Ridsdale & Craddock*.

[1 Common Pleas Division, 329.]

Jan. 26, 1876.

BAILEY and Another v. JAMIESON and Others.

Highway—Access becoming impossible.

A way ceases to be a "public highway" where the access to it at either end has become impossible by reason of ways leading to it having been legally stopped up.

THE first count of the declaration alleged that the defendants broke and entered land of the plaintiffs at Bothal village, and broke down fences, and destroyed the herbage, &c. The second charged similar trespasses in Bothal Wood; and the third in Welbeck Wood.

Pleas,—1. Not guilty,—2, 3, and 4, a denial that the land, fences, and herbage in the first and second counts respectively mentioned belonged to the plaintiffs,—5. To the first count, a claim of a right of way,—6. To the first count, that the plaintiffs had unlawfully erected barriers, and the defendants removed them,—7 and 8. Similar pleas to the second and third counts,—9. Leave and license. Issue.

The cause was tried before Pollock, B., at the last Newcastle spring assizes. There was evidence that there had formerly been a public footway, though not a very convenient or much frequented one, through certain woods held by Bailey under the Duke of Portland, called respectively Welbeck Wood and Bothal Wood, leading from a place called Sheepcot Rectory to Bothal village; but that, in consequence of other ways which led to it having been stopped by orders of the quarter sessions in September, 1873, and March, 1874, there ceased to be any access to either end of it.

Upon this evidence a verdict was entered for the plaintiffs, damages, 40s., upon each count, with leave to the defendants to move to enter the verdict for them, if the [330] court should be of opinion that, notwithstanding the impossibility of access to it, the way still continued to be a public highway.

A rule *nisi* having been obtained, *Herschell*, Q.C. (*Gainsford Bruce* and *Ridley* with him), showed cause: Although doubts have been entertained as to whether the lawful stopping up of one end of a road which has been long used as a thoroughfare, destroys its character of a public highway,—see *Wood v. Veal* ('); *Rex v. Downshire (Marquis)* ('),—it has never been suggested that, where a road has been lawfully stopped up at both ends, it remains still a public highway.

Crompton and *Littler* were called upon: It is admitted that the place in question was formerly a public highway through Bothal Wood. "It is an established maxim," says Byles, J., in *Dawes v. Hawkins* ('), "once a highway always a highway; for, the public cannot release their rights, and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of *ad quod damnum*, or by proceedings before magistrates under the statute." There are several cases in which the effect of the stoppage of one end of a highway has been discussed; but this is the first time that the question has arisen with reference to the case of both ends being stopped. A highway is defined in Hawk, P. C., Book 1, c. 76, to be a way leading from town to town, which is common to all the king's subjects. "A way to a market, a great road, &c., common to all passengers, is a highway;" Per Hale, 1 Vent., 189; cited, Com. Dig. Chimin (A 1). In *Reg. v. Burney* ('), it was held that a man might be indicted for a nuisance upon a public path which had been stopped at one end by the authority of an act of Parliament, for that it was still a highway, although it had become a *cul de sac*. Blackburn, J., there says: "There are *dicta* of Pat-331] teson, J. ('), and other judges, *that a *cul de sac* may be a highway, and there is authority that new openings may be made into a highway from the adjoining lands. Although this piece of unused road may be of little value, its obstruction cannot be absolutely no possible injury to any member of the public. The finding of the jury that the road is of no public utility should be an important consideration in deciding upon the punishment of the defendant, but it is not sufficient to justify him in depriving the public of a right."

(') 5 B. & Ald., 454.

(') 4 Ad. & E., 698.

(') 8 C. B. (N.S.), 848, 858; 29 L. J. (C.P.), 343.

(') 31 L. T. (N.S.), 828.

(') "It has been held that, where there never was a right of thoroughfare, a

jury might find that no public way existed; but it has never been settled that, where there had been a public right of passing through, the right of way was abolished by stopping one end of the passage." Per Patteson, J., in *Rex v. Downshire (Marquis)*, 4 Ad. & E., 698.

And Lush, J., says: "There is a public right over all or any part of a public highway; and, when a highway is stopped by sessions order or by act of Parliament, the public are not deprived of any more of their right than the order or statute expresses."

[LORD COLERIDGE, C.J.: Blackstone, vol. 2, p. 35, speaks of the king's highway, "which leads from town to town."]

Though now obstructed, can the court say that this path has ceased to be a highway, though it possibly may become so again by new openings being made into it? In *Gwyn v. Hardwicke* (*) Alderson, B., says: "If the question were whether, when an act of Parliament gave the power to stop up part of a public way, the other part is destroyed, I should say not; it may remain as a cul de sac. . . . Then, if there be no absurdity in construing the words of this act literally, why should we not do so, and say that the part of the footpath which is not stopped up will remain a public footway?" "An ancient highway cannot be changed without an inquisition found on a writ of *ad quod damnum* that such change will be no prejudice to the public:" Bac. Abr., Highways (C); or by act of Parliament: *Rex v. Flecknow* (*). In *Bateman v. Bluck* (*) it was held that a public highway may in point of law exist over a place which is not a thoroughfare. Although the way in question has become for the present inaccessible, access to it may peradventure be opened up again through part of the land abutting on it.

LORD COLERIDGE, C.J.: The question in this case is now, as far as I know, raised for the first time. It is not doubted that *the stopping of the roads by the orders of the [332 quarter sessions was a proper act. Those orders were not appealed from. But it is said that an unexpected consequence has followed from that stoppage, and that raises the question which we have to determine. We must take it that the roads so stopped formerly opened into another road which was not in terms stopped by the justices. But, the access to both ends of that road having become impossible, it has lost its character of a highway which it had at the time of the stoppage. Now, it is admitted that there is no authority directly in point,—none at least has been found,—to show that a track retains the character of a highway where, by an act lawful in itself, the access to it has altogether been intercepted. We are driven, therefore, to

(*) 1 H. & N., 49, 55; 25 L. J. (M.C.), 97.

(*) 1 Burr., 461, 465.

(*) 18 Q. B. 870; 21 L. J. (Q.B.), 406.

And see *Rugby Charity (Trustees) v. Merryweather*, 11 East, 375, n.

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Bailey v. Jamieson.

decide this case upon principle. Now, the common definition of a highway that is given in all the text-books of authority is, that it is a way leading from one market town or inhabited place to another inhabited place, which is common to all the Queen's subjects. Although there are no cases precisely in point, there have been some which will to a certain extent assist us, where it has been argued that a road one end of which had been lawfully obstructed ceased to be a highway, as in *Wood v. Veal*(¹) and *Rex v. Downshire (Marquis)*(²). The conclusion to which the court came in those cases was that the stoppage of one end did not make a road cease to be a common highway; for, though it thereby became a cul de sac, the public still might have a right to go over it to the end and back. These cases do not decide the point now before us: still they assist us to this extent, that, to constitute a highway, there must be some notion of a passage which begins somewhere and ends somewhere, and along which the public have a right to drive or to walk from its beginning to its end. Here, that notion is entirely absent. By proper authority this way has become inaccessible at both ends. It remains a track which no member of the public can legally get upon, and therefore the defendants have failed to justify their presence there. If the defendants had a right to be there, though they got there by an act of trespass, they would not be trespassers for being there. It is necessary, therefore, to determine whether or not it remains a highway. I am of opinion that 333] it does not. Its character of a *public highway is altogether gone. The rule to enter a verdict for the defendants will therefore be discharged.

DENMAN, J.: I am of the same opinion. The great difficulty here seems to arise from the familiar dictum "once a highway always a highway," and from the necessity of now for the first time placing a limitation upon it. But I think we are compelled to hold that this is a case where that which formerly was a highway, but which, though it has not been stopped by statutory process, has, by reason of legal acts at either end of it, ceased to be a place to which the Queen's subjects can have access, loses its character of a highway. The cases cited, and others to the same effect, show that where a public highway has, by reason of an Inclosure Act, or by other lawful means, been stopped at one end, and so converted into a cul de sac, it does not therefore cease to be a highway. But, where both ends are stopped, so that no one can have access to any part of

(¹) 5 B. & Ald., 454.

(²) 4 Ad. & E., 698.

it without committing a trespass, I see no difficulty in holding that it is no longer a highway. Dealing as we are with a short piece of foot-path, I do not think the arguments *ab inconvenienti* which have been urged by the defendants' counsel should weigh with us, so as to prevent us from coming to the logical conclusion that this way has ceased to be a public highway.

LINDLEY, J.: I am of the same opinion. Mr. Herschell's argument amounts in substance to this, that there cannot be a public highway public access to which has lawfully been stopped at either end. I agree to that. At the same time I am desirous of guarding myself against being supposed to suggest that a public highway can legally be destroyed without resort to the proper statutory means.

Rule discharged.

Solicitors for plaintiffs: *Bailey, Shaw, Smith & Bailey*, for G. & F. Brumell, Morpeth.

Solicitor for defendants: *Brownlow*, for Keenlyside & Forster, Newcastle.

In this country, it seems to be settled that a *cui de sac* may be a highway: Angell on Highways, §§ 27-31, 136-8; Thompson on Highways, 8-6; Wiggins v. Tallmadge, 11 Barb., 457; Holdane v. Coldspring, 21 N. Y., 474; People v. Kingman, 24 N. Y., 559, 565; People v. Johnson, 7 Mich., 492; Danforth v. Duvall, 8 Allen, 242; Bissell v. N. Y., etc., 23 N. Y., 64-5; Washburn on Easements, tit. *Cul de sac*.

[1 Common Pleas Division, 342.]

May 10, 1876.

[IN THE COURT OF APPEAL.]

*RICHARDSON V. THE GREAT EASTERN RAILWAY [342] COMPANY.

Railway Company—Negligence—Defect in Truck—Foreign Truck—Duty to examine.

The defendants, a railway company, have a junction at Peterborough, at which they receive from other lines a great number of trucks, which they, being bound by law to give facilities for through traffic, are compelled to forward with dispatch to their destination. The defendants, when a foreign truck comes on their line, cause it to undergo such a general examination as can take place without causing an undue delay, that is to say, the tires of the wheels are tapped with a hammer, and the truck generally looked over for defects.

A foreign truck, loaded with coal, belonging to the B. Wagon Company, came on to the defendants' line at Peterborough, and there underwent the usual examination, when a defect in one of the springs and a crack in the woodwork was discovered. The truck was shunted, upon the discovery of the defects, in order that it might be repaired by the wagon company to whom it belonged. The defect in the spring, which was the only pressing defect, was repaired, and the truck was handed over to the defendants, and sent on by them to its destination. On the way an acci-

dent, by which the plaintiff was injured, happened through the existence of a crack in one of the axles of the truck. It was stated in evidence that by a minute examination of the truck the crack in the axle might have been discovered. The defect in the axle was entirely unconnected with the defects previously discovered. The jury, in answer to questions left them by the judge, found that the crack in the axle might have been discovered by a sufficiently minute examination; but that the defendants were not bound to examine the truck minutely, so as to enable them to see the crack. In answer, however, to a third question left to them, viz., as to whether, although it might not be the defendants' duty on the first view of the truck to examine it minutely, it did not become their duty to do so upon discovery of the 343] defects in the spring and woodwork, the jury answered that it was their duty to require from the wagon company some distinct assurance that the truck had been thoroughly examined and repaired:

Held, reversing the decision of the court below, that on these findings the defendants were entitled to a verdict; for the defendants were not bound to do more in the way of examining the foreign truck on its arrival at Peterborough than they had done, and inasmuch as the defects discovered on such examination were entirely unconnected with the defect that caused the accident, they were not responsible by reason of their failing upon the discovery of such defects to enter upon a more minute examination of the truck, or to make any such inquiry of the wagon company, as suggested by the finding of the jury.

APPEAL from the decision of the Court of Common Pleas, making absolute a rule to enter the verdict for the plaintiff for £250.

The facts are fully set forth in the report of the case in the court below (13 Eng., 343).

Hawkins, Q.C., Parry, Sergt., and Marriott, for the defendants.

Biron and Lush, for the plaintiff.

It is unnecessary to set out the arguments, which were substantially the same as in the court below.

JESSEL, M.R.: This is an appeal from the judgment of the Common Pleas Division, directing a verdict to be entered for the plaintiff for £250 damages.

The question to be decided is whether there was any negligence proved on the part of the defendants. The outline of the facts, as proved, is as follows: A coal truck belonging to the Birmingham Wagon Company, but which had been let to a colliery company, came on to the defendants' line at Peterborough. The defendants are compelled by statute to forward foreign traffic, i.e., through traffic, from other lines. It seems to me that the railway company are bound to take reasonable care to ascertain that trucks belonging to other companies and persons so coming on their line are in such a state as to travel safely. They must therefore use due diligence in the examination of such trucks, and the question is whether, on the facts in this case, that obligation was discharged. As to this question, the evidence was substantially this. At Peterborough there are every week a very great number of trucks sent along the

defendants' line from other lines. An examination is made of such *trucks by servants of the company appointed for the purpose; it has been called a " cursory " examination; it is not an examination of a very minute character; that would be practically impossible; but certain precautions are taken by the workmen employed on this duty, which are usually taken by railway companies in such cases, and are generally found by experience to be sufficient. All these usual precautions were adopted here, and two defects were discovered, one being that a spring had lost its camber, and the other a crack in the woodwork, which was not so material. Notice of the first defect was given to the Birmingham Wagon Company, which had a workshop near Peterborough, that they might get that defect remedied; and with regard to the other defect, it being inconvenient to unload the truck, without which the defect could not be remedied, and it being unnecessary to remedy it immediately, as it did not interfere with the safety of the truck, that defect was left to be remedied subsequently. The truck was accordingly shunted, that the spring might be repaired, and on its return to the defendants, their servant ascertained that the repair had been done, and examined the truck in the usual way, to see that there was no other defect. It was then sent on, and the accident occurred through a defect in no way connected with the two defects previously mentioned, viz., a defect in the axle. The real question is, whether the company were guilty of negligence in not making a more minute examination; for there is no doubt that, the crack, having reached the surface, might have been discovered by a sufficiently minute examination. We must look to what is reasonable in reference to the exigencies of the case. The company cannot stop all foreign trucks and empty them for the purposes of a minute examination. If they were entitled to do so, it would practically destroy the right given by statute to other companies of having the through traffic forwarded, and give a monopoly to the company itself. The suggestion that they should do this is too absurd to bear discussion. It cannot be said that it is obligatory on the company so to treat the foreign trucks as to destroy the very object for which they were sent on to the line, viz., for the purposes of through traffic. There must be some reasonable limit to the amount of examination required, and the substantial question was whether the mode of examination adopted by *the company was reasonably satisfactory. It ap- [344] pears to me that the jury did answer that question substan-

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tially in the defendants' favor. Three questions were put to the jury; the first was, whether the defect in the axle would have been discovered upon any fit and careful examination of it which it might have been subjected to. The jury answered, yes. The second question was, whether it was the duty of the defendants to examine the axle by scraping off the dirt and minutely looking at it—so minutely as to enable them to see the crack—and so to prevent or remedy the mischief. The jury answered, no. The third question was, whether, if that was not their duty upon the first view of the truck, it became their duty so to do when, upon having discovered the defect (in the spring and in the side of the truck), they ordered it to be repaired, and it remained for four or five hours on their premises for that purpose. The jury answered, "It was their duty to require from the Birmingham Wagon Company some distinct assurance that it had been thoroughly examined and repaired." The meaning of the last question appears to be this; assuming that it is not in general incumbent on the company to do more in the case of foreign trucks than they did here, still a defect having been discovered, did that throw on them a duty to do more? I think there can be only one answer to that question. If the defect discovered were such as ought reasonably to induce a person of experience to think that some other defect existed, or was likely to exist, then there would be a duty to examine further; but if the defect discovered had no probable connection with any other undiscovered defect, then I see no reason why any further or other examination should be made. Now I read the answer of the jury to the third question as meaning that there was no such duty as suggested by the question, but that the defendants ought to have inquired. But there was no evidence on which they were entitled to find that such a duty existed, or that it had been neglected. It is not for the jury to lay down an absolute duty such as this, irrespective of the case and the evidence laid before them. It is impossible to make that answer a foundation for a verdict against the defendants. If it was the defendants' duty to inquire, it could only be because they were bound to satisfy themselves of the fitness of the trucks, and if so bound, they 346] could not exonerate *themselves by mere inquiry of the wagon company. If it had been proved that they relied on mere inquiry, I am not sure that might not, *per se*, be evidence of negligence. I do not think we ought to give any effect to this finding of the jury, and the case for the

plaintiff therefore fails. The judgment must therefore be reversed.

MELLISH, L.J.: I am of the same opinion. The question depends on the nature of the defendants' obligation with regard to what are called foreign trucks, i.e., trucks sent on to their lines by other companies. They are bound in point of law to carry on these trucks to their destination, unless they can show some good reason for refusing. The plaintiff has, in order to make out that the action is maintainable, to show two things: first, that the defect in the axle of the foreign truck, through which the accident happened, was discoverable, for if the defect was undiscoverable, clearly the defendants could not be liable; secondly, that the defendants were in fault in not discovering it. It was shown by the evidence on the part of the railway company, which was substantially uncontradicted, that a very great number of trucks come through Peterborough every week; and that it is impossible that they should be examined minutely, but a mode of examination is adopted which in practice is generally found sufficient to disclose defects if any exist. It was practically undisputed by the plaintiff's counsel, that, if the usual examination having been made, no defects had been discovered, there would have been no case against the defendants, but it was said that, upon a defect being discovered by the usual examination, the truck ought then to have been thoroughly overhauled. The Chief Baron put two questions with regard to this part of the case, viz., the second and third questions. The second question was, whether it was the duty of the defendants to scrape off the dirt and examine the axle minutely. That question the jury answered in the negative. The third question seems to me to ask whether, assuming that there might not in general, or in the first instance, be such a duty, there was such a duty under the particular circumstances of the case; i.e., whether the discovery of the defect on the cursory examination made it the duty of the company to examine more minutely. It seems to me, having regard to [347 the finding on the second question, that the jury, by their answer to the third question, meant to negative the existence of the duty to examine more minutely as they had done in their answer to the second question; but they add a finding, that it was the duty of the defendants to have inquired of the wagon company as to the repairs. What effect are we to give to that finding? It was never alleged by the plaintiff that it was the duty of the defendants to inquire of the wagon company. There was not a single

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witness who said that it was in the usual course of business, or a proper thing, to make such an inquiry. We cannot, I think, give any effect to a mere suggestion of the jury respecting a matter as to which they were not asked, and as to which there was no evidence before them. If it had been put to the jury that there was such a duty, an answer would have very easily suggested itself. It would be urged that it would be a very foolish thing to place any confidence in such an inquiry. The people who send the wagons will always say that they are in good repair. I think, therefore, that this finding must be disregarded, and that we can only consider the substantial effect of the finding as an answer to the question put, and, as I have already said, I think it negatives the existence of the duty.

I cannot help thinking that the decision in the court below proceeded on some misapprehension of the facts, and there are expressions in the Lord Chief Justice's judgment which would seem to show that he was under the impression that the repairs for which the truck was stopped at Peterborough were general repairs, whereas it seems clear that there was no question of repair at Peterborough other than with respect to the spring and the crack in the side of the truck. The spring was, in fact, repaired, and the crack in the side, though it remained unrepaired, had no connection whatever with the failure of the axle, through which the accident did occur. For these reasons, I think, there was no evidence of negligence on the defendants' part, and the decision of the court below must be reversed.

POLLOCK, B.: I agree that the verdict should be entered for the defendants. My only doubt has been whether it 348] would be *necessary to have a new trial, for if there were any evidence of negligence fit to be submitted to a jury we could not properly enter a verdict for the defendants. I am now satisfied, however, there was no sufficient evidence of negligence on the defendants' part. The only sensible construction of the answer to the third question appears to me to be that the jury intended to negative the duty as to which the question was asked, but they added to that negative a finding that the defendants ought to have inquired of the company. It seems obvious that that must have been their meaning, for the two duties, the duty to examine for themselves and the duty to inquire, could hardly coexist.

It seems to me that the third question was unnecessary. If, on the whole of the evidence, it had appeared that there was any connection, or probability of connection, between

the defects discovered, i.e., the defects in the spring and the side and the defects in the axle, the case would have been different, and the question might have been material. It appears to me impossible to impose on the defendants the duty of making a minute examination of the whole truck because defects have been discovered in some part of the truck which have no connection with the probable existence of defects in any other part of the truck. For these reasons, I also think the judgment should be reversed.

Judgment reversed.

Solicitors for plaintiff: *Freeman & Bothomley*, for Kelsey & Son.

Solicitor for defendants: *W. H. Shaw*.

It has been held that a common carrier of passengers is bound absolutely, and irrespective of negligence, to provide roadworthy vehicles: *Alden v. N. Y., etc.*, 26 N. Y., 102.

This case was however modified: *McPadden v. N. Y. Cent.*, 44 N. Y., 478, as below stated.

So it was held that a railroad company is liable for injuries to a passenger, caused by a crack in the iron axle of a car, although the defect could not have been discovered by any practicable mode of examination: *Alden v. N. Y., etc.*, 26 N. Y., 102; *Hegeman v. Western, etc.*, 13 N. Y., 9; *Robbins v. Mount*, 33 How., 37, 4 Rob., 566.

But the doctrine of these cases was considerably modified in *McPadden v. N. Y. Cent.*, 44 N. Y., 478; 2 U. S. Jurist, 130, reversing 47 Barb., 241; *Redhead v. Midland, etc.*, 4 Am. Law Rev., 63; 20 Law Times Rep., N.S., 268; L. R., 4 Q. B., 379; 2 id., 417; *Taylor v. Railway*, 48 N. H., 312; 2 Am. R., 229; *Saunders' Neg.*, Am. ed., 14-21.

See *Searle v. Laverick*, 8 Eng. R., 298; 1 Alb. L. J., 6.

Passenger carriers bind themselves to carry safely those whom they take into their coaches, to the utmost care and diligence of very cautious persons: *Maverick v. Eighth Av.*, 36 N. Y., 378; *Steamboat, etc., v. King*, 16 How., (U.S.), 469.

The conductor of a horse railway car is bound to know where, under the circumstances, it is prudent to stop the car, and to bring a passenger to the

platform to get off the same: *Maverick v. Eighth Av.*, 36 N. Y., 378.

As to the roadway, although railroad companies are bound to exercise the utmost care and vigilance for the safety of their passengers, they are not held to an absolute warranty that the passengers shall not be injured, rendering them liable in any event, in the absence of negligence. If they are bound to provide for the transportation of passengers, a roadway and train free from defect, irrespective of the question of negligence, this rule should not be extended so as to render them liable for the *vis major* of extreme cold, by which a sound rail is broken, and which could not have been anticipated or avoided by any human foresight: *McPadden v. N. Y. Cent.*, 44 N. Y., 478, reversing 47 Barb., 247; *Deyo v. N. Y. Cent.*, 34 N. Y., 9; *Meir v. Penn. R. R.*, 64 Penn. St. R., 225; 2 Alb. L. J., 158; 3 Am. Rep., 581; *Taylor v. Railway*, 48 N. H., 312; 2 Am. R., 229.

See *Warner v. Erie*, 39 N. Y., 468, reversing 49 Barb., 558.

If a passenger claim that a rail was broken before the train reached it, he is called upon to show the fact by evidence. The mere fact that another train had passed over the road a short time before, does not present any question that can properly be submitted to a jury: *McPadden v. N. Y. Cent.*, 44 N. Y., 478; *Deyo v. N. Y. Cent.*, 34 N. Y., 9; *Trans. Co. v. Downer*, 11 Wallace, 130, 10 Am. Law Reg., N.S., 360, 363 note.

See *Edgerton v. N. Y., etc.*, 39 N. Y.,

229, 230; Breehen v. Great Western, 34 Barb., 256; Withers v. North Kent, etc., 8 Hurl. & Norm., 969; Western, etc., v. Downer, 11 Wallace, 129; S. C., 10 Am. Law Reg., N.S., 360.

The rule is that a master or principal is liable for the acts or the negligence of his servant, or agent, while legitimately engaged about his master's business: 3 Eng. R., 313 note; 4 id., 392 note; 9 id., 223-5 note; note to Goslin v. Agricultural Hall Co., post, p. 367; Robinson v. Webb, 11 Bush. (Ky.), 465; Rounds v. Delaware, etc., 64 N. Y., 129; Cohen v. Dry Dock, etc., 15 Alb. L. J., 289; 4 Weekl. Dig., 334, N. Y. Court Appeals; Shea v. Sixth Av., 62 N. Y., 180, affirming 5 Daly, 221; Weed v. Panama, etc., 17 N. Y., 362; Phil., etc., v. Derby, 14 How. (U.S.), 468, 480; Levy v. Brooks, 121 Mass., 501; Phelin v. Stiles, 43 Conn., 426; Pittsburgh, etc., v. Theobald, 51 Ind., 246; Curtis v. Grand Trunk, etc., 12 Upper Can. Com. Pl., 89; Williamson v. Grand Trunk, 17 Upper Can. Com. Pl., 615; Swabey v. Palmer, Prince Edwards' Island R., 202.

As to when one is a servant and not a contractor: Johnston v. Hastie, 30 U. C. Q. B., 232; Torpy v. Grand Trunk, etc., 20 U. C. Q. B., 446.

Right here it seems to us is the point in which an error was committed in Isaacs v. Third Av. R. R., 47 N. Y., 122.

It was as much the duty of the carriers to set down the passenger carefully and safely as to carry him. If their own servant violated this duty of the carrier the company would be liable for such violation, whether wilful or not: Craker v. Chicago, etc., 36 Wisc., 657; Cosgrove v. Ogden, 49 N. Y., 255; Rounds v. Del., etc., 64 N. Y., 129; Shea v. Sixth Av., 62 N. Y., 180; Pittsburgh, etc., v. Pillow, 76 Penn. St. R., 510; Hughes v. N. Y., etc., 36 N. Y. Superior Ct. R., 226; Hamilton v. Third Av., 13 Abb., N.S., 318; Moore v. Met. Railway, 4 Eng. Rep., 203, reversing S. C., at N. P., 25 Law Times

Rep., N.S., 591; Haley v. City, etc., 28 Ohio St. R., 23.

So it seems to us: Parker v. Erie Railway Co., 5 Hun, 57, was not properly decided for the reason stated as to Isaacs v. Third Av. R. R.

Though the master is not liable for the wilful act of his servant not within the discharge or a violation of a duty of the servant in his employment: Whitaker v. Eighth Av., 51 N. Y., 295; 3 Eng. Rep., 313 note; 4 id., 392 note; 9 id., 223-5 note; Cohen v. Dry Dock, etc., 4 N. Y. Weekly Dig., 334; 15 Alb. L. J., 289; Rounds v. Delaware, etc., 64 N. Y., 129; Porter v. C. R. I., etc., 41 Iowa, 358; Snyder v. Hannibal, etc., 60 Mo., 418; Hudson v. M. K., etc., 16 Kans., 470.

As to cases where it is a question of fact whether in master's employ, see Cormack v. Digby, Irish L. R., 9 C. L., 557; Rounds v. Delaware, etc., 64 N. Y., 129.

Nor is a carrier liable for a wilful injury to a passenger by another passenger, or a third person not connected with the carrier. It is, however, bound to exercise the utmost vigilance in maintaining order and guarding its passengers from violence. It is bound, with all the means at its command, when occasion requires, to protect passengers from injury, and to expel one who so demeans himself as to endanger the safety or to interfere with the reasonable comfort and convenience of other passengers: Putnam v. Broadway, etc., 55 N. Y., 108; Milman v. Hudson River, etc., 66 N. Y., 642-4; Pittsburgh, etc., v. Hinds, 53 Penn. St., 512, 7 Am. Law Reg., N.S., 14; 2 Redf. Am. Railw. Cases, 568 and note; Pittsburgh, etc., v. Pillow, 76 Penn. St. R. 510, 1 Monthly Western Jur., 498; Murphy v. Union, etc., 118 Mass., 228; Craker v. Chicago, etc., 36 Wisc., 657; Anderson v. Ross, 2 Sawyer, 91; New Orleans, etc., v. Burke, 53 Miss. 200; Moak's Van Sant. Pl., 340.

[1 Common Pleas Division, 349.]

May 17, 1876.

***BRANTOM V. GRIFFITS and Others. [349]**

Bill of Sale, what amounts to—Bills of Sale Act, 17 & 18 Vict. c. 36, ss. 1, 7—Growing Crops—"Capable of complete Transfer by Delivery."

Growing crops are not personal chattels within the Bills of Sale Act.

A contract in writing for the sale of personal chattels, if the property passes by the contract, is a transfer or assurance of personal chattels within the Bills of Sale Act.

INTERPLEADER issue, in which the plaintiff claimed as against the defendants, execution creditors, certain horses and growing crops seized upon the farm occupied by the execution debtors.

The case was heard before Lindley, J., at the last spring assizes for Buckinghamshire, when the facts were as follows :

A farm was occupied by three sisters named Miles, but Adelaide, one of the sisters, appeared to have had the management of the business. On the 13th of January, 1875, the execution debtors being in want of money, the plaintiff agreed to advance the amount required in consideration of a sale to him of certain growing crops. The following document was executed in pursuance of such arrangement :

"Miss A. Miles, of, &c., hereby agrees to sell to William Brantom, of, &c., five acres of wheat, now standing in the Beeches, adjoining to Mr. Smith's, Drayton side, at the sum of £6 per acre, the said William Brantom to cut and carry the corn any time he may require ; and the said William Brantom doth hereby agree to purchase the said five acres of corn as mentioned above on the above conditions.

"ADELAIDE MILES.

"WILLIAM BRANTOM."

On the 5th of March, 1875, a similar transaction took place, and a document was executed in the following terms :

"Miss A. Miles, of, &c., hereby agrees to assign to William Brantom, of, &c., three acres of wheat now standing in the Beeches, adjoining the piece bought before [here followed further description], at the sum of £6 per acre, the said William Brantom to cut and carry the corn any time he may require ; and the *said William Brantom [350 doth hereby agree to purchase the aforesaid three acres of corn mentioned above on the aforesaid conditions.

"ADELAIDE MILES.

"WILLIAM BRANTOM."

Subsequent sales of growing crops under similar circumstances, and in respect of which similar documents were executed, took place between the parties.

On the 28th of June, 1875, the execution debtors were distrained upon for rent, and applied to the plaintiff for further sums of money. It was arranged that the plaintiff should pay out the distress, and in return for the advance a further sale of growing crops took place, and it was also arranged that some horses should be transferred to the plaintiff. The document executed as to the crops was similar to those above set out. With regard to the horses the following document was executed :

"Memorandum of agreement between William Brantom, of, &c., and Miss Miles, of, &c.. I, William Brantom, hereby agree to take to the gray mare and two colts, and nag mare, and the black mare, now belonging to Miss A. Miles, for the amount of £80; the said William Brantom to take possession, and the said Miss Miles to authorize the said William Brantom to do the same. I, Miss Miles, hereby agree to assign the above-mentioned stock to William Brantom on the above conditions.

"WILLIAM BRANTOM.

"ADELAIDE MILES."

The crops and horses which formed the subject of the above transactions remained on the farm premises, and were seized there. The defendants having obtained a judgment against the Misses Miles, issued a *fi. fa.* on the 30th of July, and the seizure was made shortly afterwards.

Upon these facts it was objected by the defendants' counsel (*inter alia*) that the documents above mentioned were bills of sale, and void under the Bills of Sale Act for want of registration.

The verdict was entered for the defendants, leave being reserved to the plaintiff to move to enter it for the plaintiff 351] for the sum *that had been paid into court under the interpleader order as the value of the goods.

Merevether and *Young Clare* moved in pursuance of the leave reserved, and to enter judgment for the plaintiff: These documents are not bills of sale. They are not transfers or assurances of personal chattels. They are merely memoranda of agreements of sale, evidence of the contract of sale, but not constituting the contract itself. If it be otherwise, in every case where there is a sale within the Statute of Frauds, and a memorandum of the bargain is given to satisfy the statute, if such memorandum is not

registered as a bill of sale, and the goods are left in the possession of the vendor more than twenty-one days, the act applies, and the execution creditor of the vendor can seize the goods. An instrument, to be within the section, must be an instrument by which the property purports to pass. The property in such a case passes by the previous contract itself, not by the memorandum, which is not the contract, but merely evidence of it.

Secondly, with regard to the growing crops, they are not personal chattels, and so are not "goods" at all within the act. And if they could be considered as "goods," they are not goods capable of complete transfer by delivery within the meaning of the 7th section.

[They cited *Allsop v. Day* (°); *Byerley v. Prevost* (°); *Wake v. Harrop* (°); *Sheridan v. McCartney* (°); and *Gough v. Everard* (°).]

Metcalf, Q.C., and *Collyer* showed cause: These documents are assurances of personal property within the Bills of Sale Act. It is clear that sales may be within the act, because sales in the ordinary way of business, which this was not, are expressly excepted. The writing here is the contract, and by such contract the property passed.

With regard to the growing crops, it is contended that they are goods capable of complete transfer by delivery within the 7th section. *Growing crops are goods [352 and chattels as between the heir and executor and the executor and remainderman. They may be taken in execution and as a distress, and a sale of them is within the 17th, and not within the 4th, section of the Statute of Frauds.

[BRETT, J., referred to Williams on Executors, 7th ed., p. 709, where growing crops are said, in a note, to be for "most" purposes personal property.]

They are capable of complete transfer by delivery. There may be a symbolical delivery of them: a man might be put in possession in respect of them whilst they were growing, and until they arrived at maturity. They are clearly within the mischief of the act, for the occupier of the land appears to be in possession of them whilst they remain on the land. The case of *Sheridan v. McCartney* (°) is a distinct authority that growing crops are within the act.

[They also cited *Jones v. Flint* (°); *Newman v. Cardi-*

(°) 7 H. & N., 457; 31 L. J. (Ex.), 105.

(°) Law Rep., 6 C. P., 144.

(°) 1 H. & C., 202; 31 L. J. (Ex.), 451.

(°) 11 Ir. C. L., 506.

(°) 2 H. & C., 1; 32 L. J. (Ex.), 210.

(°) 11 Ir. C. L. (N.S.), 506.

(°) 10 A. & E., 753.

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nal ('); *Marshall v. Green* ('); Dalton's Executor, p. 556; *Peacock v. Purvis* ('); Comyns' Digest, tit. Biens, A 2.]

Merewether, in reply: The definition of "apparent possession" clearly shows that growing crops are not within the statute. That taken with the words "capable of complete transfer by delivery," shows that what was contemplated was the case where goods that might be delivered were left in the use and enjoyment of the transferor, notwithstanding that formal possession had been given. Growing crops cannot be delivered, and cannot be used and enjoyed. The term "formal possession" has no application to them.

BRETT, J.: The argument for the defendants is, admitting that there was no fraud, and a *bona fide* sale was intended of the articles now in question; that the documents which have been laid before us amount to bills of sale within the meaning of the Bills of Sale Act, 17 & 18 Vict. c. 36; and 353] as they were not registered, *and the goods remained in the possession of the vendors, the transaction is void as against the execution creditors. This argument resolves itself into two points. The first question is, whether, assuming that the subject-matter of the transactions was within the act, these documents amounted to bills of sale within its provisions. It is argued for the plaintiff that they are not bills of sale, and do not come within the description of instruments mentioned in the 7th section. The contention is that there was a good verbal contract apart from the documents under which the property passed; and the documents do not constitute the contract itself, but are only evidence of it. It seems to me that, although there may have been such a verbal contract, and although money may have been paid under it, and so a writing would not be essential, yet, if the terms of the contract are at the time, as here, reduced into writing and signed by the parties, and the writing contains all the terms of the contract, and those terms are such as would pass the property in the subject-matter of the contract, such a document is a transfer or assurance of personal chattels within the 7th section. That being so, inasmuch as the property was left in the possession of the execution debtors for more than twenty-one days, it follows, if the subject-matters of the contracts were within the act, the contracts ought to have been registered, and, not being registered, are void as against the execution creditors.

(1) 2 F. & F., 840.

(2) 1 C. P. D., 35.

(3) 2 B. & B., 362.

Now, the horses are clearly personal chattels within the act, and must therefore go to the defendants; but as to the growing crops a difficult question is raised, which constitutes the second point argued before us. If growing crops were goods and chattels in contemplation of law for all purposes, they must be within the act, and the documents as to them must be registered. So, also, if they were never goods and chattels in the contemplation of the law, the opposite result would follow. But it seems to me that the result of the authorities is that, though for certain purposes and under certain conditions they are goods and chattels, they are not so for all purposes, and therefore we must inquire further. The learned author of *Williams on Executors*, 7th ed., p. 709, lays it down that growing crops, as between the executor and heir, *and the executor and the re- [354] mainderman, are personal property, and says that for most other purposes also they are personal property, but he does not say that they are so for all purposes. They may be taken in execution and under a distress, but I take it that, as between vendor and purchaser, they would pass, by a conveyance of land, as part of the land without express words; if so, for that purpose they are realty, and not goods and chattels. It follows from this that they cannot be said to be within the act, on the ground that they are mere personal goods and chattels for all purposes. Neither can it be said that they are necessarily excluded from the act because they never are personal chattels.

Inasmuch as growing crops are of this doubtful character, it becomes necessary to examine the provisions of the act more closely, in order to see whether they are such goods as come within its terms, or whether they nevertheless are included within its provisions. The first section enacts that every bill of sale of "personal chattels" shall be registered, and by the interpretation clause "personal chattels" mean "goods, furniture, fixtures, and other articles capable of complete transfer by delivery." It was argued for the plaintiff that growing crops were not goods; and even if they were, they were not capable of complete transfer by delivery. It was further argued that the real meaning of that part of the interpretation clause was shown by the subsequent part of it which defines "apparent possession." It is there enacted that the personal chattels shall be deemed to be in the apparent possession of the person giving the bill of sale so long as they remain on land or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal

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possession may have been taken by or given to any other person. It was argued that these words as to personal enjoyment, taken together with the expression "capable of complete transfer by delivery," show that the act only applies to things which, at the moment when the bill of sale is given and the provisions of the act are to be applied to it, might be delivered to the assignee, and are not, but are left in the enjoyment of the assignor; and that it follows that, as growing crops are not capable of being used or enjoyed 355] or of being delivered at the time when the provisions of the act are said to apply to them, they are not personal chattels within its meaning. Independently of authority, I agree with that argument. There is, however, the decision of the Irish court to the contrary. That decision is entitled to the greatest respect, and if I did not feel very strongly that the true interpretation of the statute is as I have stated, I should feel bound to yield to the authority of that decision. But the decision is not a binding authority upon us; and if, on examination of the reasons given for it, we are unable to agree with them, we are entitled to form our own conclusion. Now the reasons given by the Lord Chief Justice in that case seem to me to be based upon an interpretation of the statute resting on the principle "*Expressio unius alterius exclusio*." It is put that, inasmuch as stock or produce which by covenant or custom ought not to be removed from the premises is excepted by the interpretation clause, it follows that growing crops, where there is no question of such a covenant or custom, must be included. But I cannot help thinking that the stock or produce so referred to means produce already severed from the land, and which might be delivered, although by the covenant or custom it ought not to be removed from the farm. If so, the antithesis is not between growing crops and such stock or produce, but between such stock or produce and similar stock or produce which may be removed.

If so, the foundation of the judgment in *Sheridan v. McCartney* (1) is gone, and the doctrine on which it is founded is inapplicable. For these reasons, though wishing to speak with all respect of that decision, I cannot follow it. If that judgment had been brought before the courts of this country and approved of, we might have been bound by it; but, on the contrary, we find that in *Gough v. Everard* (2) the Court of Exchequer seems to have had great doubts of its correctness. The Lord Chief Baron says that it can only be supported if the act is construed liberally and freely, but

(1) 11 Ir. C. L. (N.S.), 508.

(2) 2 H. & C., 1; 32 L. J. (Ex.), 210.

he points out that, on the contrary, having regard to the nature of the act, it is one which ought to be construed strictly. It deals with transactions which may be perfectly *bona fide* and honest, and imposes certain restrictions upon them. An act which, however salutary, may have the effect of taking away rights of property honestly acquired, must be construed strictly. For these reasons I think we cannot follow the decision of *Sheridan v. McCartney* ('). The result is, that as to the amount of the value of the horses the plaintiff fails, but as to the amount of the value of the growing crops, the judgment must be entered for the plaintiff.

ARCHIBALD, J.: I agree. With regard to the question whether these documents are bills of sale within the act, I think that they are. It seems to me that they are documents intended to pass the property in the subject-matter of them, and so are transfers within the act. The argument that the document is only evidence of the agreement which exists independently of the writing would go far to destroy the effect of the act. It would be in the power of every person giving a bill of sale to make a prior verbal agreement which would pass the property, and put it afterwards into writing, and then to contend that the writing was only evidence of the contract. Assuming that the subject-matter of these documents was within the act, I think they are bills of sale which required to be registered. The second point is whether these goods were personal chattels within the act. I entirely agree with what my Brother Brett has said on this point. I think that growing crops may be chattels for some purposes, but even admitting this, that they are not chattels within the act, but are expressly excluded by the terms of the 7th section. They are not capable of complete transfer by delivery within that section, because they are not capable of delivery for any useful purpose while growing. The case put by the plaintiff's counsel seems to me conclusive on that point. Suppose the sheriff seized them under an execution and sold. They must remain on the land while growing and then the sheriff might seize again under a second execution, and if the defendants' contention were correct, the objection might be made to the purchaser under the first execution that the bill of sale was not registered. We must read *the words "capable [357 of complete transfer by delivery" with the definition of "apparent possession." Growing crops cannot be otherwise than in the apparent possession of the vendor. This

(') 11 Ir. C. L. (N.S.), 506.

seems to me clearly to show that the act does not apply to them. It has been urged that the words of the act, excepting stock or produce which by covenant or custom ought not to be removed from any farm, show that growing crops must be within the statute unless the subject of such a covenant or custom. But it seems to me that those words are satisfied by making them apply to produce severed from the land. If so, the opposite to produce mentioned in the act is produce which is severed, and is not the subject of such a covenant or custom; and the maxim "*Expressio unius alterius exclusio*," does not help the defendants' contention. With regard to the Irish decision, I desire to speak of it with great respect; but it seems to me that the attention of the judges was not called to the effect of the definition of "apparent possession." If their attention had been called to it I think they would have seen that, as growing crops must whilst growing remain upon the land of the vendor, and, therefore, cannot be otherwise than in the apparent possession of the person giving the bill of sale, they are not within the scope of the act. The application of the statute must be limited to articles of which possession could have been given to the vendee and which are capable of removal.

Judgment for the plaintiff.

Solicitor for plaintiff: *Mole.*

Solicitor for defendants: *Selby.*

See 13 Eng. R., 19 note; 15 Eng. R., 228 note; Thompson's Law of the Farm, titles "Crops," "Cropping Contracts"; Washburn on Real Estate, tit. "Crops"; Willard's Real Estate, 77, 83; 1 Fisher on Mort. (3d ed.), 412; 2 id., 928; Taylor's Land, and Tenant, titles "Crops," "Cropper," "Emblements."

As between vendor and vendee, growing crops are real estate, and unless reserved, pass to the purchaser by a deed of the land as being annexed to and forming a part of the freehold: Talbot v. Hill, 68 Ill., 106; Wood v. Lang, 5 Up. Can. Com. Pl., 204; Kilbride v. Cameron, 17 Upper Can. Com. Pl., 373; See Keatz v. White, 19 Upper Can. Com. Pl., 36.

Though not to an inchoate purchaser: Richardson v. Trinder, 11 Upper Can. Com. Pl., 130.

A purchaser under a mortgage foreclosure takes the crops growing upon the land mortgaged: Shepard v. Philbrick, 2 Den., 174; Simers v. Saltus, 3 Den., 214; Lane v. King, 8 Wend.,

584; Jewett v. Keenholts, 16 Barb., 196; 2 Fisher on Mort. (3d ed.), 928; 1 Hilliard on Mort. (4th ed.), 181 note; Id., 195; Thomas on Mort., 51.

Though if sold by the mortgagor before sale and reserved by the mortgagee at the sale the purchaser will not take them, even if not excepted by his conveyance: Sherman v. Willett, 42 N. Y., 146; Congden v. Sanford, Lator's Sup., 196.

Where land of a debtor is sold, under the order of a surrogate to pay the debts of the deceased, the purchaser is entitled to the growing crop: Jewett v. Keenholts, 16 Barb., 193.

Crops growing at the death of the owner of real estate, in New York, pass to his executor and not to his heir or devisee: 2 R. S., 82, § 6; Bradner v. Falkner, 34 N. Y., 347; Sherman v. Willett, 42 N. Y., 150.

So in Indiana: Humphrey v. Merritt, 51 Ind., 197.

In Maine unharvested crops go to the devisees of the land, and not to

the executor. As against the heirs at law they go to the executor; but as against the devisees they do not, unless it appear by the will that the testator so intended: *Dennett v. Hopkins*, 63 Maine, 350.

A mortgage on real state was foreclosed, and the real estate was sold under the decree of foreclosure to the mortgagee. Thereafter the mortgagor died, and afterwards a crop of corn was planted and cultivated on said land by the widow and son of the mortgagor, which fully matured before the year for the redemption of the land had expired. Held, that said corn was not liable for the payment of taxes chargeable against the mortgagor: *Gregory v. Wilson*, 52 Ind., 233.

Where the plaintiff had leased land for a share in the crops, his portion to be delivered to him in cribs and then to be measured, and before the crops had been gathered they were levied upon as the property of the tenant, whereupon the landlord brought replevin for the same: Held, that the plaintiff could not maintain the action, as he had no such property in the crops until they were gathered and divided as to enable him to maintain replevin.

In the case of a leasing for a share of the crops raised, to be divided after the same is gathered, the title to the whole of the crop raised will be that of the tenant until divided and possession given; and after the levy of an execution against the tenant, an agreement between him and the landlord that the latter shall receive his share in the field will not be allowed to de-

feat the levy: *Sargent v. Courier*, 65 Ills., 245.

Where one let a farm for one year with the privilege of sowing a crop of rye in the fall, the lessor permitted the lessee to put in the crop: Held the lessee's title thereto was good: *Litre v. McKinstry*, 41 Barb., 186, affirmed 3 Abb. Court App. Dec., 62.

The conveyance of land will not pass grain raised thereon which had been set apart as the landlord's portion, in the absence of a contract to that effect.

The sale of a farm reserving to the tenant the right to gather his corn, does not give to the purchaser a right to the crop: *Moffit v. Armstrong*, 40 Iowa, 484.

Though a sale of land may be fraudulent as against creditors, still, where the evidence showed that the execution debtor (the vendor) had not raised the crops, the subject of the seizure, or furnished the means of doing so, but the labor and means had been contributed by the vendee alone: Held, that the crops were the sole property of the vendee as against the execution creditor: *Kilbride v. Cameron*, 17 Upper Can. Com. Pl., 373.

To sustain an action of replevin the property must be susceptible of seizure by the officers and delivery to the plaintiff. And accordingly, such action brought for a certain number of bushels of corn was held not to lie, where the crop was standing ungathered, in the field: *Jones v. Dodge*, 61 Mo., 868.

But see *Kaufman v. Schilling*, 58 Mo., 218.

[1 Common Pleas Division, 358.]

May 9, 1876.

*MEYER and Others v. RALLI and Others. [358]

Marine Insurance—Constructive total Loss—Judgment of foreign Tribunal—Sale of Things insured by Order of foreign Tribunal.

The presumption with regard to the judgment of a foreign court is that it is correct according to the law of the country to which it belongs, but when it was admitted by the parties that the law of the foreign tribunal had not been correctly declared by its judgment:

Held, that such judgment was not binding on an English court.

The expenses which may be recovered by the assured under the suing and laboring clause in a policy of insurance free of particular average, are confined to

the expenses which are necessary to avert a total loss, for which the insurer would be liable.

A sale of the subject-matter of insurance ordered by a foreign tribunal within whose jurisdiction it has been originally thrown by perils insured against, does not amount to a constructive total loss where the sale is not due to perils insured against, such perils having ceased to operate, but is made for the purpose of repaying advances incurred through the captain's breach of duty in not transhipping the subject-matter of insurance to its destination.

A cargo of rye, shipped on an Austrian ship for carriage from Enos, a Turkish port, to Schiedam, was insured by a policy warranted free of particular average. The ship meeting with stormy weather, a portion of the cargo was damaged, and the ship had to put into the port of La Rochelle. Proceedings were taken, at the instance of the captain, in the Tribunal of Commerce at that port, and, in consequence, the cargo was landed and warehoused. It was necessary to sell a portion of the cargo immediately, which was accordingly done. On the 21st of February the court, on the petition of the captain, ordered a sale of the residue, and notice of abandonment was given to the defendants as insurers on the ground that, in the opinion of the experts or surveyors, the rye could not be forwarded to its destination. This notice the defendants refused to accept; and on the 5th of March the defendants, as insurers, summoned the captain before the Tribunal of Commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye.

The court accordingly ordered the residue of the rye to be surveyed, and the surveyors reported that it could be reshipped and conveyed to its destination. This report was confirmed by the court, and notice of it given to the assured, together with notice that any course pursued with the cargo would be for their account and on their responsibility. The rye, however, was not forwarded, and remained until December warehoused at La Rochelle, although the captain might have procured a ship to carry it on. The captain having in the meantime procured advances to meet the expenses caused by the interruption of the voyage, was summoned, by the parties who had made the advances, before the Tribunal of Commerce; and on the 14th of September the court decreed a sale of the ship, and a statement of general and particular average of the ship and cargo to be drawn up, which was accordingly done. On the 21st of December the Tribunal of Commerce decreed the sale of the rest of the cargo, on the ground that the weather was unfavorable for its preservation. On the 25th of January the Tribunal of Commerce decreed that the full amount of the freight due upon the whole voyage was chargeable upon the proceeds of such sale; and an amended average statement, which proceeded on this footing, was confirmed by the court. If the proportion of freight so payable was to be added to the extra expenses incurred in respect of the residue of the cargo so sold by reason of the interruption of the voyage, including the extra freight in respect of forwarding to the port of destination, the amount would exceed the value of the rye at the port of destination. It was admitted that neither the law of France or Austria was in accordance with the decree of the 25th of January, and if the proper proportion of freight had been charged to the residue of cargo sold, the value at the port of destination would have exceeded the expenses:

Held, that there was no constructive total loss of the cargo; inasmuch as the decree for the sale of the residue of the cargo was not due to the perils insured against, but was made for the purpose of paying advances incurred through the captain's breach of duty in not forwarding such rye to its destination; and the insurers were not concluded by the judgment of the French court from denying that there was no total loss, because it was admitted that such judgment was erroneous according to the law which it professed to administer.

SPECIAL CASE. The facts sufficiently appear from the head-note and judgments.

1875. Nov. 11, 15. *Cohen, Q.C. (McLeod with him), for the plaintiffs*: First, it is contended that the plaintiffs are

entitled to recover as for a constructive total loss. The cargo was ordered to be sold by a court of competent jurisdiction, the circumstances that brought it within such jurisdiction being perils insured against. This entitled the plaintiffs to give notice of abandonment. Unless circumstances subsequently arose under which the cargo owner was able and could reasonably be expected to take to part of the cargo, and so, as it were, the total loss was adeemed, the plaintiffs remain entitled to recover as for a total loss. It is for the underwriters to show that a prudent man ought reasonably to have intervened in the proceedings of the foreign tribunal. The uncertainties and heavy expenses of the litigation in this case were such as to render it the part of a prudent man not to interfere. It is contended, at any rate, that the actual sale of the residue of the cargo worked a total constructive loss. If the subject-matter of the insurance, having been brought within the jurisdiction of a competent court by perils of the seas, is actually sold by order of such court, so as to pass the property to the purchaser, that is a *constructive total loss, and an owner cannot [360 reasonably be expected to engage in uncertain and expensive litigation to prevent such sale. He is entitled to abandon the cargo to the underwriters, leaving them to intervene.

It is contended that the defendants' intervention in the proceedings on the 5th of March, 1866, amounted to an acceptance of the notice of abandonment, and estopped them from denying a total loss. If there was not a total loss, in what capacity did they intervene?

Secondly, the plaintiffs are entitled to recover the expenses incurred with respect to the cargo at La Rochelle under the suing and laboring clause. The expenses appear, on the facts stated in the case, to have been incurred for the purpose of preventing a total loss. If the cargo had not been unloaded and warehoused after the sea damage, the whole would have been ruined. But it is contended, that even if that were not so, the warranty against particular average does not limit the suing and laboring clause to expenses incurred to prevent a total loss. The two are quite independent clauses, and the effect is that the insurers agree to bear all expenses incurred for the protection of the cargo. If the origin of the warranty against particular average be looked to, it will be seen that the same reasoning does not apply to expenses actually incurred in protecting the thing insured as to partial damage, with respect to which it is often difficult to say whether it was really caused by sea

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perils or not. Public policy, and the interests of the underwriters themselves, point to this construction. The insured is not bound to take any steps, and may let the cargo become totally lost. Every inducement should be given to the captain to take all precautions for the preservation of property.

Benjamin, Q.C. (*Norman* with him), for the defendants: There was no total loss. The statements of the case distinctly show that, according to the principle laid down in *Farnworth v. Hyde* (¹), this was so. A substantial portion of the cargo was saved, which was worth the expense incurred, including that of transhipment to the port of destination. The only distinction in this case is the order of the court at La Rochelle for sale of the residue of the 361] *cargo. But that sale was not necessitated by the sea perils; that part of the cargo was perfectly safe, and at the owner's disposal, and the captain ought to have forwarded it to its destination, but he applied for an order to sell it. The decision of the French court, that the full freight was due, does not conclude the defendants. It is found in the case that, according to French law and Austrian law, the residue of the cargo was not subject to payment of the full freight at La Rochelle, and consequently there was no total loss. The average statement, therefore, made by the order of the court, was incorrect according to the law of the tribunal. This court is, therefore, not bound by the order of the foreign court, such order being admitted by the parties to be erroneous according to the law which the foreign tribunal had to administer.

With regard to the suing and laboring clause, only such expenses can be recovered as were necessary to avoid a total loss. The suing and laboring clause is meant to protect the interest of the insurer.

The greater part of these expenses was not incurred to protect the subject-matter of the insurance from the perils of the sea at all. The damaged portion of the cargo is sold, and a substantial portion then remains on land, in no danger whatever, and at the disposal of the owner, and for more than a year expenses are incurred in respect of it, instead of its being forwarded. How can such expenses in any case be brought within the suing and laboring clause?

Cohen, Q.C., in reply.

[The following authorities were cited during the argument: *Stringer v. English and Scottish Marine Insurance*

(¹) 18 C. B. (N.S.), 835; Law Rep., 2 C. P., 204.

Co. ('); Cammell v. Sewell ('); Castrigue v. Imrie ('); Rossetto v. Gurney ('); Farnworth v. Hyde ('); Kidston v. Empire Marine Insurance ('); Dent v. Smith ('); Messina v. Petrocchino (').]

Cur. adv. vult.

*1876. May 9. The judgment of the court (Lord [362 Coleridge, C.J., and Grove, and Archibald, JJ.) was delivered by

ARCHIBALD, J.: This is a special case, with power to draw inferences of fact. The action is on a valued policy of insurance on 18,750 kilogrammes of rye valued at £2,731, including £150 advance, on a voyage from Enos to Schiedam, in the Austrian ship Unico, warranted free of particular average unless the ship be stranded, sunk, or burnt, which was underwritten by the defendant in the sum of £2,731. The policy also contains the usual clause that, in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns to sue, labor and travel for, in, and about the defence and safeguard and recovery of the said goods, merchandises, ship, &c., or any part thereof, without prejudice to the insurance, to the charges whereof the assurers will contribute.

On the 21st of July, 1865, the defendants had entered into a charterparty with one Fattuta, of Venice, for the charter of the Unico, then lying at Smyrna, to proceed to Enos, a Turkish port, and there load a cargo of grain or corn, and carry it to Amsterdam or Schiedam direct, and had on the 2d of November, 1865, shipped at Enos on board the vessel, of which Antonio Lucovich was the master, a cargo equal to 2,343 English quarters, or 6,800 hectolitres of rye, sound and in good order and well conditioned. The captain received at Enos £150 pursuant to the terms of the charterparty. He also signed a bill of lading.

On the 8th of March, the Unico, then laden with the said cargo in bulk, left Enos on the voyage. On the 14th of November, 1865, the plaintiffs, through their agents, Messrs. Schroder & Bonniger, in London, purchased from the defendants for £2,735 8s. 6d. the cargo in question, including freight and insurance to Schiedam as per charterparty; and on the 21st of November the defendants handed to them the policy in question.

(¹) Law Rep., 4 Q. B., 676; Law Rep., 5 Q. B., 599.

(²) 1 H. & N., 617; 5 H. & N., 728; 27 L. J. (Ex.), 447; 29 L. J. (Ex.), 350.

(³) Law Rep., 4 H. L., 414.

(⁴) 11 C. B., 176; 20 L. J. (C.P.), 257.

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(⁵) 18 C. B. (N.S.), 835; 34 L. J. (C.P.), 207; Law Rep., 2 C. P., 204.

(⁶) Law Rep., 1 C. P., 535.

(⁷) Law Rep., 4 Q. B., 414.

(⁸) Law Rep., 4 P. C., 144.

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During the months of November and December, 1865, the *Unico* on her voyage met with very tempestuous weather, in consequence of which she was obliged to jettison a portion equal to 300 hectolitres of the insured cargo; and on the 14th of January, 1866, after hoisting signals of distress, she was taken by a French fishing-smack into the 363] port of La Rochelle, in France. On *arrival, the captain placed himself in the hands of Messrs. Admyrault & Seignette. M. Admyrault was the Austrian consul, and his firm made all necessary advances of cash to the captain.

Certain proceedings were, as stated in the special case, taken at the instance of the captain in the Tribunal of Commerce at La Rochelle, in consequence of which, first, a portion, and eventually the whole of the cargo was landed and warehoused by order of the court. On the 10th of February, 1866, a portion of the cargo, amounting to 5,552 kilogrammes, was by order of the Tribunal of Commerce sold, and realized 8,537*fr.* 65*c.* On the 21st of February, 1866, on the petition of the captain, the court ordered the sale of the residue of the cargo by public auction.

Immediately on receiving information of this order, on the 21st and 22d of February, 1866, Messrs. Schroder & Bonniger, on behalf of the plaintiffs, gave notice of abandonment to the defendants, on the ground that, in the opinion of the experts or surveyors, the rye could not be forwarded to its destination. This notice the defendants declined to accept.

On the 5th of March, 1866, the defendants, in their capacity of shippers, vendors, and insurers of the cargo, summoned Captain Lucovich before the Tribunal of Commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye, and for the tribunal to order a new survey. The tribunal thereupon ordered that the sale of the rye should be provisionally suspended, and that a new inspection should be proceeded with by three surveyors, whose instructions were to say if it were possible, by continuing the expedients of manipulation and ventilation, to preserve it in its good condition, so as to enable it to be reshipped without risk, and to be conveyed to Schiedam, its destination.

On the 14th of March the surveyors, having examined the rye, then in certain warehouses, were unanimously of opinion that the grain might be perfectly well reshipped and conveyed without any danger to Schiedam; recommending that, if not reshipped very speedily, it should be subject to

ventilation once a month *until the moment of its [364 being put on board for conveyance to its destination. This report was confirmed, and ordered to be executed by the said court, and notice of it was given to the plaintiffs on the 17th of March, 1866, together with notice that any course pursued with the cargo or any portion of it was for their account and on their responsibility.

On the 11th of May, 1866, the captain of the Unico applied to the Tribunal of Commerce for and obtained authority to raise a loan on the bottomry of the ship, freight, and cargo. On the 6th of June, the captain filed a petition in the Tribunal of Commerce stating that he had been unable to effect a loan on bottomry, and asking the tribunal to declare the ship unnavigable under articles 369 and 389 of the French Code de Commerce, and a decree was made in conformity with the petition.

On the 21st of June, 1866, Messrs. Admyrault & Seignette, who had made considerable advances to meet the several expenses caused directly or indirectly by the forced interruption of the voyage, summoned Captain Lucovich before the Tribunal of Commerce to show cause why, in default of payment to them of 20,000*fr.* within a fortnight from that date, they should not be authorized to sell for account of whom it might concern the said ship and the remainder of her cargo, the price to be paid over to them and used for the purpose of covering the advances made or to be made, and the surplus paid over to whom it might by justice be commanded; and upon the 11th of July, 1866, after service of the last-mentioned summons, Captain Lucovich issued a summons to the underwriters and the then unknown holder of the bill of lading of the cargo, in order to their becoming parties to the suit commenced by the summons of the 21st of June, and submitting such conclusions and arguments as they might think proper, and to hear it declared that the judgment to be pronounced was to be common to and binding upon all the parties.

The summons of the 21st of June came on for hearing on the 14th of September, 1866, in the absence of the defendants or any person appearing on their behalf, when the tribunal ordered the sale of the ship Unico, and a statement of general and particular *average of the ship and [365 her cargo to be drawn up, which was accordingly done.

On the 22d of October, Messrs. Michel et fils having, on behalf of the plaintiffs, made a claim for the payment of 3,780*fr.* for the advance freight paid to Captain Lucovich, and the captain inferring from this that the plaintiffs were

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the holders of the bill of lading for the cargo, then served upon them a notice of the judgment of the 14th of September, 1866, and a summons to attend on all subsequent proceedings.

The plaintiffs had not, prior to the 23d of October, informed the master of the Unico that they were the holders of the bill of lading, and had not been summoned to attend any of the proceedings before the Tribunal of Commerce, and had not made themselves parties to the said proceedings.

On the 21st of December, 1866, the Tribunal of Commerce remanded to the 25th of January then next the decreeing respecting the statement of average; but, nevertheless, on several grounds, among others that the state of the weather was unfavorable to its preservation, ordered the sale of the remainder of the cargo of the Unico, and the purchase-money was ordered to be paid over to Messrs. Admyrault & Seignette, to cover the advances made by them, which included expenses incurred in and about the unsold portion of the rye down to the date of the decree, together with the charges required by the law,—the costs to be costs of average. This last mentioned judgment was given in the absence of any person representing the defendants. On the 10th of January, under the said order the remainder of the cargo, 2,779 61 hectolitres, was sold by public sale at La Rochelle, and realized a net sum of 27,830*fr.* 30*c.*

The total agreed freight of the cargo from Enos to Schiedam was 16,695*fr.* 95*c.* Of this, 3,780*fr.* (£150 sterling) was, as already stated, advanced at Enos, leaving 12,915*fr.* 95*c.* unpaid.

On the 25th of January, the Tribunal of Commerce by its judgment declared that the freight for conveyance of the cargo from Enos to Schiedam was due in its entirety (including freight on the 300 hectolitres jettisoned), and that 366] the advances to the captain *on account of freight at Enos must contribute to general average, and referred back the statement to the average-stater for the purpose of modifying the calculations therein; keeping in view, first, the said judgment, secondly, the sum realized by the sale of the rye, thirdly, the various costs in the suit. The Tribunal also said that the average-staters were at the same time to establish the net amount of the freight to be received by the captain out of the sum realized by the sale of the cargo.

The plaintiffs in this action were summoned through their agents, P. Michel & fils, to appear in these proceedings; but they made default, and the judgment of the 25th of January was rendered without any opposition. The defen-

dants in this action were not summoned to appear or defend the proceedings of the Tribunal of Commerce otherwise than by a summons left at the bar of the procureur Impérial, according to the French procedure, but not received by the defendants.

On the 24th of May, 1867, the Tribunal of Commerce confirmed an amended statement of general and particular average, which had meanwhile been made, and condemned the plaintiffs to pay the sum of 12,915*fr.* 95*c.* remaining due on account of freight, with interest from the 11th of July, 1866, to the time of payment, and ordered that the sum, being as stated in the judgment secured on the cargo, should be paid to Captain Lucovich by Messrs. Admyrault & Seignette, as consignees. The said sum, together with 1,000*fr.* damages and interest thereon from the 28th of June, 1867, and together with an additional sum for costs subsequent to that date, was paid ultimately at La Rochelle to Captain Lucovich, after divers proceedings taken by him against the plaintiffs, out of the proceeds of the cargo. Such payment was made under and in pursuance of a judgment of the Civil Tribunal of La Rochelle of the First Instance, dated the 7th of August, 1867.

It is stated in paragraph 52 of the special case, that, by the law of France, the Tribunal of Commerce had jurisdiction to order the said various surveys of the ship and cargo and statements of average, and to make the said various orders, judgments, and decrees; but that it is a Court of First Instance of inferior jurisdiction, *and its judgments, orders, and decrees are subject to appeal to the Imperial Court at Poitiers, which if made is usually decided in four or five weeks; and that no appeal was taken on the part of the plaintiffs.

It was admitted also in the case that the damages referred to in paragraphs 8, 11, and 13 were caused by the perils insured against. It is also found that the rye which was sold on the 10th of January, 1867, was in March, 1866, and in January, 1867, merchantable rye, and such as, if it had been carried on to Schiedam at any time between the time of its landing at La Rochelle and the time of its sale, would have fetched at Schiedam a price considerably more than the total of all the extra expenses properly incurred in respect of it and consequent upon the interruption of the voyage under the circumstances, including the extra freight of forwarding it to its destination. It is also admitted by the defendants that, if the proportion of freight payable upon the rye sold on the 10th of January under the said

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average statement is to be taken into account and added to the extra expenses aforesaid, the amount would be more than the rye would have fetched at Schiedam, if forwarded to its destination either in March, 1866, or January, 1867.

The questions which arise in the case are,—First, whether there was a constructive total loss of the cargo,—Secondly, if not, whether the plaintiff is entitled to recover any and what portion of the expenses under the sue and labor clause.

For the purpose of deciding these questions, it is necessary to consider the effect of the proceedings and orders of the Tribunal of Commerce of La Rochelle. But, before doing so, it may be worth while to inquire what under the circumstances was the duty of the captain. It is found in the case (paragraph 51) that, by the law of France, the master under the circumstances was not entitled to full freight upon the cargo landed there; but that by art. 296 of the Code de Commerce he was bound to hire another vessel to carry on the cargo to its destination, and, if unable to hire a vessel, was entitled to *pro rata* freight only; and that the law of Austria on this subject is the same as that of France. It is further found that it would have been practicable to hire another vessel to carry on the cargo to 368] its destination. The case also *states that the portion of the cargo that was sold by order of the Tribunal of Commerce on the 10th of January was merchantable, and would have fetched at Schiedam a price considerably more than the total of all the extra expenses properly incurred and consequent upon the interruption of the voyage, including the extra freight of forwarding to its destination.

It is quite clear, therefore, that if the captain had done his duty, the portion of the cargo sold on the 10th of January, 1867, would have been forwarded to Schiedam, and that there would in that event have only been a partial loss, the portion of the cargo forwarded being only liable to pay so much of the freight of forwarding from La Rochelle,—*Rosetto v. Gurney*(¹),—as exceeded the original rate of freight. The question is, what is the effect of the proceedings in the French courts, on this simple state of the case.

In the view which we take, we do not consider it material, for the purpose of dealing with the question whether or not there was a constructive total loss, to discuss the effect of the various surveys and orders of the Tribunal of Commerce of La Rochelle prior to the order of the 21st of December, 1866, by which the residue of the cargo was ordered to be

(¹) 11 C. B., 176.

sold, except in so far as the great lapse of time without any effort on the part of the captain to perform his duty bears on the case. There are portions of those orders and judgments, no doubt, which are properly judgments *in rem*, or in the nature of judgments *in rem* and binding as against all the world, and, amongst others, as against both the plaintiffs and defendants. But, when we come to the order of the 25th of January, 1867, whereby it was declared that the freight for conveyance of the cargo to Schiedam was due from the plaintiffs to the shipowner (or the captain as his agent) in its entirety, it cannot be regarded as in the nature of a judgment *in rem* ⁽¹⁾; and, apart from the fact the defendants were no parties to that judgment, though we draw the inference of fact that the plaintiffs had such notice of it ⁽²⁾ that they might have appeared and defended, *there is this peculiarity in the case, which does not, [369 so far as we are aware, seem to have occurred before, that, upon the express findings in the special case, by which both parties are bound, this part of the judgment seems to be manifestly erroneous in regard to the law of France, on which it professes to proceed.

The remark that the defendants were no parties to the judgment equally applies to the judgment of the 7th of August, 1867, of the Civil Tribunal of La Rochelle, by which the proceeds of the residue of the cargo attached in the hands of Messrs. Admyrault & Seignette was confirmed, and the entire amount of freight ordered to be paid out of it. The defendants, therefore, can hardly be bound by the declaration that the residue of the cargo which was sold on the 10th of January, 1867, should bear its entire proportion of freight to La Rochelle, in addition to the extra freight of conveying it to Schiedam, or by the order to pay it out of the proceeds of the goods. Moreover, even if the defendants could be considered as at all indirectly affected by such a judgment as binding the plaintiffs, the question is how far, considering the findings in the case, we should be bound to give effect to it as against the plaintiffs.

It is a matter of nicety how far a judgment of a competent foreign court *in rem*, or between the same parties, is examinable here. The authorities on the subject are all collected in Story's Conflict of Laws, §§ 547 *et seq.*, and in

(1) See *Cammel v. Sewell*, 3 H. & N., 617; and *Scottish Marine Insurance Co.*, Law 5 H. & N., 728; 27 L. J. (Ex.), 447; 29 L. J. (Ex.), 350; *Casrique v. Imris*, Law Rep., 4 H. L., 414; *Stringer v. English*

Rep., 4 Q. B., 676.

(2) See *Reynolds v. Fenton*, 3 C. B., 187.

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the notes to *Doe v. Oliver* (¹), and need not be referred to in detail.

In the late case of *Schibsby v. Westenholz* (²), the principle on which effect is given to the judgments of foreign tribunals is stated to be, not on the ground merely of international comity, but on the ground that the judgment of a "court of competent jurisdiction over the defendant imposes a duty or obligation to pay the sum for which judgment is given, which the courts of this country are bound to enforce; and consequently anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action" (³). This principle is also assumed and acted on in *Goddard v. Gray* (⁴), where the majority of the court held that the judgment was binding, notwithstanding that [370] *it proceeded on a mistake as to English law, which did not appear to have been knowingly or perversely acted on.

In Story's Conflict of Laws, the extent to which and the grounds on which a foreign judgment is said to be examinable or open to be impeached are thus summed up (⁵): "It is easy to understand that the defendant may be able to impeach the original justice of the judgment, by showing that the court had no jurisdiction, or that he never had any notice of the suit, or that it was procured by fraud, or that it is irregular and bad by the law *fori rei judicatee*. To such an extent the doctrine is intelligible and practicable." In *Castrique v. Imrie* (⁶), the House of Lords upheld a decree *in rem* of the Tribunal of Commerce of Havre, in which a decree was made in clear violation of English law, on the ground that, the foreign law being ascertained as a matter of fact in the case, the French court, with every honest endeavor to be right, was liable, without any fault, to go wrong either from imperfect evidence produced before it, or misapprehension of its effect. But, in that case, in delivering the opinion of the majority of the judges, Blackburn, J., speaking of the judgment on matters of French law, says (⁷): "We must (*at least till the contrary is clearly proved*) give credit to a foreign tribunal for knowing its own law, and acting within the jurisdiction conferred on it by that law." And in the case of *Becquet v. McCarthy* (⁸), Lord Tenterden had said before, "We ought

(¹) 2 Sm. L. C., 751, 7th edit.

(²) Law Rep., 6 Q. B., 155.

(³) Per Blackburn, J., Law Rep., 6 Q. B., at p. 159.

(⁴) Law Rep., 6 Q. B., 139.

(⁵) § 607.

(⁶) Law Rep., 4 H. L., 414.

(⁷) Law Rep., 4 H. L., at p. 430.

(⁸) 2 B. & Ad., at p. 957.

to see very plainly that the court has decided against the French law, before we say that their judgment is erroneous on that ground,"—implying that, if it clearly appeared, the court would not give effect to the judgment. Here, the court expressly professes to proceed on the ground of French law; and, although the presumption would be that the court in delivering judgment would be taken to know its own law, still it clearly appears that that law was not followed, and we are precluded by the findings in the case from holding that the court has rightly declared it. The contrary,—to use the words of Blackburn, J.,—clearly appears, and, either from inadvertence or some other reason, the foreign tribunal has gone manifestly wrong. It does not profess to declare what is the law of Austria. If it had, *though equally wrong, we might have been bound [371 by *Castrique v. Imrie* (1) to have given effect to it: but it is a declaration of French law which is wrong.

Under these circumstances, we are of opinion that there is no rule of comity and no principle on which we are called upon to give effect to such a judgment, and that *pro rata* freight only was payable on the cargo at La Rochelle. If, then, freed from the burden of the entire freight at La Rochelle, the case finds that the portion of the rye sold on the 10th of January, 1867, would have realized at Schiedam more than enough to have covered the extra freight from La Rochelle, and in that event, had it been forwarded, there would only have been a partial and no constructive total loss (2).

We must, however, consider the effect of the order of the 21st of December, 1866, for the sale of the residue of the goods, and whether it could under the circumstances appearing in the case constitute a total loss.

Now, although the sale may have been valid and binding, and the plaintiff may thereby have been deprived of the goods (3), still, upon the facts as found, it was a sale of a portion of goods which it was the duty of the captain to have transhipped and forwarded, for which a ship might have been hired at La Rochelle, and which, if forwarded at any time between the time of its landing at La Rochelle and the time of its sale some twelve months after, would have realized at Schiedam considerably more than the total of all the extra expenses properly incurred in respect of it and consequent on the interruption of the voyage.

(1) Law Rep., 4 H. L., 414.

(2) See *Carmel v. Sewell*, 3 H. & N.,

(3) See *Rosseto v. Gurney*, 11 C. B., 617; 5 H. & N., 728; 27 L. J. (Ex.), 176; 20 L. J. (C.P.), 257.

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Under these circumstances, it is impossible not to see that, although the ship and cargo were originally brought within the jurisdiction of the Tribunal of Commerce of La Rochelle by perils of the seas, the sale of this portion of the cargo was not really due to any of the perils insured against, which had long ceased to operate in regard to this portion of the goods, but was in fact made for the purpose of paying advances incurred through the captain's breach of duty.

372] *But it was strenuously argued on behalf of the plaintiffs that the first order for sale of the entire cargo conferred on them the right to give notice of abandonment, and that nothing that occurred afterwards had varied that right. We think, however, that the proceedings in the case with respect to the last portion of the rye sold (the insurance being free of average), when taken together with the opinion we have expressed against the obligation to pay the entire freight at La Rochelle, are clearly in contradiction of that supposed right; and it becomes, therefore, unnecessary to consider a further contention of the plaintiffs, viz., that, though acceptance of the notice had been declined, still the conduct of the underwriter in intervening in the Tribunal of Commerce was evidence of such acceptance, and irrevocable.

Being, then, of opinion that there was no constructive total loss within the meaning of the policy, it remains to consider the next question,—whether the plaintiffs are entitled to recover anything and how much under the sue and labor clause.

It was argued on behalf of the defendants that, at the time the rye was unshipped, it was in no danger of total loss, and that it was unshipped solely for the purposes and benefit of the plaintiffs. But it is only necessary to look at the reports which are referred to in the special case, and which are to be taken as correctly setting forth the state of the cargo at the time, to see that it was in a state of heat and partial fermentation from sea water, which if it had been allowed to go on would (and we feel constrained to draw this inference) in all probability have resulted in such damage as to be an actual total loss. It was necessary, then, for the preservation of some substantial part of the cargo, and in order to avert a total loss, to remove or unship the whole cargo.

It cannot be contended, since the case of *Kidston v. Empire Marine Assurance Co.* (1), that the warranty "free

(1) Law Rep., 1 C. P., 535.

from particular average" excludes the operation of the suing and laboring clause: and that case is also an authority that the occasion upon which the expenses in this case were incurred was such as to be within it. As to the cases of *Great Indian Peninsular Co. v. Saunders* ⁽¹⁾, *and [373 *Booth v. Gair* ⁽²⁾], cited to us by the defendants, we need only refer to the way in which they are distinguished by Willes, J., in his learned judgment in *Kidston v. Empire Marine Assurance Co.* ⁽³⁾.

A more difficult question is as to the amount of the expenses recoverable under this head. This depends, in our opinion, upon the amount of expense necessary to avert a total loss, for which alone the defendants were liable. That is a matter which, we think, must be reasonably treated, and not judged too strictly. The unshipping of the whole cargo was necessary, in order to its preservation and to the separation of the sound part from that which was irreparably damaged. But, once conveyed to the warehouse where the separation might take place, any subsequent care bestowed on that which could not be benefited by it sufficiently to enable it to be forwarded to its destination would have been of no use whatever to the residue, and would not in any way have contributed to its preservation. We are of opinion, therefore, that the plaintiffs will only be entitled to recover under this head the expenses of unshipping the whole and conveying it to a warehouse where the separation took place, and of the separation, and the expense of conditioning that portion of it which was sold on the 10th of January, 1867.

As the case does not afford us the means of stating the amount of the expenses thus incurred, we think it must be referred back to the arbitrator to ascertain the amount, applying the principle we have laid down, and that for the sum so found by the arbitrator the plaintiffs are entitled to our judgment.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *Matthews.*

Solicitors for defendants: *Markby, Tarry & Stewart.*

⁽¹⁾ 1 B. & S., 41; 2 B. & S., 266; 30 L. J. (Q.B.), 218; 31 L. J. (Q.B.), 206. ⁽²⁾ 15 C. B. (N.S.), 291; 33 L. J. (C.P.), 99.

⁽³⁾ Law Rep., 1 C. P., 535.

[1 Common Pleas Division, 374.]

May 8, 1876.

[IN THE COURT OF APPEAL.]

374] *SOUTHWELL and Another v. BOWDITCH (').*Sale of Goods—Principal and Agent—Personal Liability of Broker.*

The defendant, a broker, signed and sent to the plaintiffs a note of a contract in the following terms: "I have this day sold by your order and for your account to my principals five tons of . . . anthracene . . . W. A. Bowditch." In an action for goods sold and delivered:

Held, reversing the judgment of the Common Pleas Division, that, in the absence of usage making the defendant personally liable, the defendant was not personally liable upon the contract.

APPEAL from a decision of the Common Pleas Division (*) in favor of the plaintiffs.

The facts are shortly stated in the above head-note, and are fully stated in the report of the case in the court below subject to the following slight additions. The fact of the defendant being a broker was known to the plaintiffs. The defendant sent to the purchasers, Messrs. Bloth & Co., a bought note corresponding to the sold note sent to the plaintiffs. The defendant disclosed to the plaintiffs the name of the purchasers before the prompt day. An attempt was made at the trial to prove usage making the defendant personally liable, but failed.

[Facts were in evidence upon which, on the argument, it was contended, on behalf of the plaintiffs, that the plaintiffs had looked to the defendant himself as principal, and were entitled, apart from the sold note, to treat him as principal; but it is unnecessary to state these facts, as the Court of Appeal answered the contention by pointing out that the plaintiffs' case at the trial had been based upon the written contract solely, and had been so treated by the court below.]

Cohen, Q.C. (*A. L. Smith* and *Purvis* with him), for the defendant: A person signing a document in his own name is no doubt bound, but only to that which he signs. And it was clear upon the face of this contract that the defendant signed only as agent, agent for the plaintiffs as well as agent 375] for the unnamed *purchasers. In *Fleet v. Murton* (*), there was merely appended to the defendants' signature the word "brokers," not "as brokers," in which the case substantially resembles the present, where the contract says not merely "sold by your order and for your account," but

(1) Reversing 16 Eng. R., 447.

(2) 1 C. P. D., 100; 16 Eng. R., 447.

(3) Law Rep., 7 Q. B., 126.

"brokerage 1%," and there the defendants, contracting for unnamed principals, were expressly held liable only on the ground of usage. *Humfrey v. Dale* (*) was also decided on the ground of usage. *Sharman v. Brandt* (*) shows that a person cannot be both party to a contract and agent to sign it on behalf of the other party, so as to bind the latter under the Statute of Frauds, and therefore that the defendant, who was agent to sign this contract on behalf of the plaintiffs as sellers, cannot have been also a party to it as buyer. The words "sold to my principals" are not equivalent to "bought for my principals." The setting out of the particulars of the contract, upon which Denman, J., below, partly relied, as showing that the defendant intended to bind himself as principal, was necessary, if for no other purpose, to satisfy the Statute of Frauds. [He referred to *Blackburn on Sale*, p. 89.]

Aspland (*Benjamin*, Q.C., with him), for the plaintiffs: The sold note in this case binds the defendant as himself the purchaser. An agent buying for an undisclosed principal is personally liable: *Thomson v. Davenport* (*), and cases cited in the notes thereto (*). There is nothing inconsistent in the form of this contract with the defendant's liability as principal: *Humfrey v. Dale* (*).

[MELLISH, L.J.: How do you answer the observations of Blackburn, J., in *Fleet v. Murton*? (*)]

It is not necessary to say that the defendant is principal; it is sufficient to contend that he has taken upon himself the liabilities of principal. *Mollett v. Robinson* (*) is only an authority that an agent cannot as against his principal acquire the rights of a principal. Cases which cannot be similarly distinguished will be found to have been cases where the signature by the agent was qualified, and to be thus consistent with *Paice v. Walker* (*). *—"Sold" [376 implies "bought:" per Lord Campbell, C.J., in *Humfrey v. Dale* (*).

[MELLISH, L.J.: But the defendant is, on the face of this contract, agent for the seller; your contention would, therefore, make him liable to both the buyer and the seller.]

If a broker chooses so to do business, there is no hardship upon him in that. The judgment of Cockburn, C.J., in

(1) 7 E. & B., 266; 26 L. J. (Q.B.), 187; E. B. & E., 1004; 27 L. J. (Q.B.), 390.

(2) Law Rep., 6 Q. B., 720.

(3) 2 Sm. L. C. (7th ed.), 364.

(4) 2 Sm. L. C. (7th ed.), 379.

(5) Law Rep., 7 Q. B., 126.

(6) Law Rep., 5 C. P., 646; Law Rep., 7 C. P., 84; Law Rep., 7 H. L., 802.

(7) Law Rep., 5 Ex., 173.

(8) 7 E. & B., 266, at p. 272; 26 L. J., (Q.B.), 137, at p. 139.

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Humfrey v. Dale ⁽¹⁾, relies on the general law as to the liability of an agent for an undisclosed principal, and not merely upon the usage proved in that case; and Williams, J., says ⁽²⁾, "The usage, if it be necessary to resort to it." But apart from the sold note the defendant is liable. The goods having been delivered, so that the Statute of Frauds is out of the question, there was upon the facts in evidence in this case a sufficient parol contract: *Pennell v. Alexander* ⁽³⁾.

[MELLISH, L.J.: Was there not, in that case, a difference between the price with which the agent debited the buyer and the price with which he credited the seller?]

The decision does not rest upon that ground.

[POLLOCK, B.: You rested your case at the trial on the sold note.]

[He referred also to *Cropper v. Cook* ⁽⁴⁾; *Gadd v. Houghton* ⁽⁵⁾.]

JESSEL, M.R.: This is an appeal from a decision of the Common Pleas Division, interpreting a mercantile contract. The first observation which I wish to make is that, so far as I know, there is in law no difference of construction between mercantile contracts and other instruments. The grammatical meaning is, as in other cases, the meaning to be adopted unless there be reason to the contrary. In the present case there can be no doubt that the person signing this contract intended to sign as broker. The contract says, "Sold by your order and for your account," and "to my principals." There is nothing whatever on the contract to show that the [377] defendant intended to act otherwise than as *broker. No doubt it does not absolutely follow from the defendant's appearing on the contract to be broker that he is not liable as principal. There are two ways in which he might so be made liable: first, intention on the face of the contract making the agent liable as well as the principal; secondly, usage. But, as to usage, none was proved; and I can see nothing on the face of this contract to make the agent liable as well as the principal. There is no more vicious line of argument, if I may say so with deference to the court below, than that which was adopted by the court below in this case of comparing one contract with another, and saying it differs very little; you arrive ultimately at identifying wholly different contracts.

⁽¹⁾ E. B. & E., 1004, at p. 1022; 27 L. J. (Q.B.), 390, at p. 396.

⁽²⁾ E. B. & E., 1020; 27 L. J. (Q.B.), 396.

⁽³⁾ 3 E. & B., 283; 23 L. J. (Q.B.), 171.

⁽⁴⁾ Law Rep., 3 C. P., 194.

⁽⁵⁾ 33 L. T. (N.S.), 311.

All the three judges of the court below rely upon previous decisions construing contracts. Grove, J., says: "I am free to admit that if this had not been a mercantile document, and we were construing a new form of contract in the same words, there might have been a real distinction between the words "I have sold for you" and "I have bought of you;" but the question is, what is the meaning of such a document as this is, viewed as a mercantile document . . . comparing it with other similar documents that have received a construction by the courts and are well known among mercantile men." The Chief Justice refers to two cases, where he says "the documents, though perhaps not in identical terms with that now in question, were substantially and in every material respect similar." Denman, J., in like manner refers to previous decisions. But have there been such decisions as the judges of the court below suppose? As to *Humfrey v. Dale* ⁽¹⁾, the judgment in the Queen's Bench proceeds on usage, and makes for the present appellant; in the Exchequer Chamber the judges differed, Willes, J., holding that there was no contract to satisfy the Statute of Frauds, Martin, B., holding that usage was essential to the plaintiffs' case, and that there was no writing to satisfy the Statute of Frauds, Channell, B., also dissenting from the judgment of the majority, but giving no reasons, while the majority of the judges, who were for affirming the judgment of the court below, thought, as the court below had done, that the usage of trade charged the defendant. As to **Fleet v. Murlon* ⁽²⁾, the judgment proceeds upon usage of trade. Cockburn, C.J., says: "I quite agree with . . . *Fairlie v. Fenton* ⁽³⁾ . . . and I am of opinion that the same principle would apply where the principal is not named so long as it appears on the face of the contract that the broker is contracting, as broker, for a principal, and not for himself as principal;" and then he goes on to refer to the admissibility of usage. Blackburn, J., in a remarkably clear judgment, says: "There is no doubt at all in principle that a broker, as such, merely dealing as broker and not as purchaser, makes a contract from the very nature of things between the buyer and the seller, and he is not himself either buyer or seller," (the phrase "the very nature of things" hitting the fallacy of the court below in this case), "and that consequently where the contract says 'Sold to A. B.,' or 'Sold to my principals,'

⁽¹⁾ 7 E. & B., 266; 26 L. J. (Q.B.). ⁽²⁾ Law Rep., 7 Q. B., 126.
⁽³⁾ E. B. & E., 1004; 27 L. J. (Q.B.). ⁽⁴⁾ Law Rep., 5 Ex., 169.

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and the broker signs himself simply as broker, he does not make himself by that either purchaser or seller of the goods." He then goes on to say that words may be added making the agent liable, and then refers to the admissibility of usage and the character in which it is admissible. Both on principle, therefore, and on authority, without referring to other cases than those to which the court below referred in support of their decision, I think that in a case like this a broker ought not to be held liable.

KELLY, C.B.: I think we are bound to construe mercantile contracts, not less than other contracts, by the words used, and according to the natural and usual meaning of those words. Otherwise we import into them stipulations never made. Is there anything in the terms of this contract to make the defendant liable? I forbear to advert to cases on usage of trade, except to remark that all such cases tend to show the necessity of usage to make the broker liable in the absence of agreement that he should be; for the attempt to prove usage failed in the present case. In the terms of the contract itself there is, I think, nothing to make the defendant liable. The contract is perfectly clear, and is not like the contracts in such cases as *Paice v. Walker* (¹). The only ground on which, so far as I can find, the court [379] below *gave the unnatural construction to the contract, by which they held the defendant liable, was that "sold for you to my principals" was equivalent to "bought of you for my principals." But, when the matter is examined, that view is found to have no other foundation than such as it may have in the dicta of two judges in *Humfrey v. Dale* (²); and there the question was, what was the effect of these words, coupled with the usage proved, not what was their effect apart from usage. On the plain language of this contract I am of opinion that there was no purchase by the defendant as principal or otherwise than as agent, and therefore that the judgment of the court below should be reversed.

MELLISH, L.J.: I am of the same opinion. I entirely agree that this, being a mercantile contract, is, like any other contract, to be construed according to the natural meaning of the words. The contract says: [He stated its terms.] Now there is, I think, a material difference between the words "sold for you to my principals" and "bought of you for my principals." The rule of law, no doubt, is that, if the principal is undisclosed, the broker saying

(¹) Law Rep., 5 Ex., 173.

(²) 7 E. & B. 266; 26 L. J. (Q.B.), 137; E. B. & E., 1004; 27 L. J. (Q.B.), 390.

"bought of you for my principals" is himself liable; but this contract says "sold for you to my principals," i.e., I, your broker, have made a contract for my principals, the buyers. The court below have held, on the authority of *Humfrey v. Dale* (1) and *Fleet v. Murton* (2), that these words mean the same thing. But in those cases usage was proved; rightly looked at, the usage added a term to the contract, and the real difficulty, as pointed out in *Fleet v. Murton* (2) by Blackburn, J., was occasioned by the form of the declaration; the majority of the judges, however, in *Humfrey v. Dale* (1), in the Exchequer Chamber, got over that difficulty, and upon their decision *Fleet v. Murton* (2) is founded; therefore neither of those cases is an authority that these words not only may but must mean the same thing. No usage was proved in the present case, and the usage which has been proved in previous cases was in other trades and at other places.

*POLLOCK, B.: I also think that the judgment of [380 the court below should be reversed. The real contention in all these cases has been whether the broker has so named himself as to make himself liable as principal. He may no doubt do so, notwithstanding that he describes himself as a broker. It depends upon the form of the contract in each case. The question to be decided is very clearly explained in *Paice v. Walker* (3). I will only add that the observation of Denman, J., in the court below, that the defendant's "setting out in the document every particular of the contract entered into" showed that he intended to make himself liable, seems to me to overlook the fact that these particulars would be as necessary between principals contracting through a broker, as between principals contracting immediately with each other.

Judgment reversed.

Solicitors for plaintiffs: *Venning, Robins & Venning.*

Solicitor for defendant: *Anthony Carr.*

(1) 7 E. & B., 266; 26 L. J. (Q.B.), 187; (2) Law Rep., 7 Q. B., 126.
E. B. & E., 1004; 27 L. J. (Q.B.), 390. (3) Law Rep., 5 Ex., 173.

[1 Common Pleas Division, 423.]

May 29, 1876.

[IN THE COURT OF APPEAL.]

423]

*NUGENT V. SMITH (').

Common Carrier—Liability of Shipowner—Act of God.

The defendant, a common carrier by sea from London to Aberdeen, received from the plaintiff a mare to be carried to Aberdeen for hire. In the course of the voyage the ship encountered rough weather, and the mare received such injuries that she died. The jury found that the injuries were caused partly by more than ordinary bad weather, and partly by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the defendant's servants:

Held, reversing the decision of the court below, that the defendant was not liable for the death of the mare.

The carrier does not insure against the irresistible act of nature, nor against defects in the thing carried itself; and if he can show that either the act of nature or the defect of the thing itself, or both taken together, formed the sole direct and irresistible cause of the loss, he is discharged. In order to show that the cause of the loss was irresistible it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented.

Per Cockburn, C.J.: A shipowner, who is not a common carrier, is not subject to the liability of a common carrier—i.e., does not insure the goods bailed to him for carriage.

The question what amounts to an "act of God" within the meaning of that expression, as applied to the carrier's exemption, discussed.

APPEAL from the decision of the Court of Common Pleas (reported 15 Eng. Rep., 203), where the facts are set forth.

Jan. 24, 25. *Benjamin*, Q.C., and *Holl* (with them *Douglas Walker*), for the defendant: The carrier by sea does not insure against all perils of the sea, but only against those to which the act of man contributes. If the goods are lost by an operation of nature, to which no act of man contributes, the loss is by the act of God, and falls within the well recognized exception to the liability of a carrier as insurer. Damage to the goods by leakage and such like ordinary incidents of sea transit, are matters against which man can provide, and consequently are not the act of God; but an unusually violent storm is. The reason generally given for the onerous nature of the carrier's duty is the [424] danger of collusion, but *that does not apply to losses by the operation of nature not contributed to by the act of man. If the carrier is guilty of any neglect to provide against the operations of nature, then the loss ceases to be by the act of God, for human agency has contributed.

(') Reversing 15 Eng. Rep., 203.

But in the present case the jury have found that there was no negligence. It is contended that so far as the protection of the goods against the act of God is concerned, the duty of the carrier is only to use due diligence, and the onus is on the plaintiff of showing the absence of such diligence. Here the plaintiff has failed to sustain that onus; the damage was partly caused by the inherent nature of the animal itself, and partly by the act of God. The carrier is clearly not answerable for a loss occasioned either by an inherent quality of the thing itself or by the act of God. [They cited *Forward v. Pittard* (1); *Trent Navigation Co. v. Wood* (2); Story on Bailments, s. 511; *Taylor v. Dunbar* (3); Angell on Carriers, p. 154; *Colt v. McMechen* (4); *Nicholls v. Marsland* (5); *Kendall v. London and South Western Ry. Co.* (6); *Blower v. Great Western Ry. Co.* (7); Parsons on Shipping, vol. 1, p. 253; *Amies v. Stevens* (8); *McArthur v. Sears* (9); Jones on Bailments, p. 103; *Lloyd v. Guibert* (10).]

Cohen, Q.C., and *Lanyon*, for the plaintiff: The definition of the term "act of God" for which the defendant contends is incorrect so far as concerns the law of carriers. It is not every natural cause to which no act of man has contributed, or against which no diligence could provide, that constitutes an act of God. A storm somewhat more violent than usual is not, within the definition, an act of God. To constitute such there must be something extraordinarily violent, sudden, and overwhelming; something that admits of no time for human intervention between itself and the damage caused. The rule as to carriers is derived from the Roman law, which was not, at any rate in terms, applicable to the case of carriers by land, but of ships navigated by their owners. The foundation of it is not the danger of collusion, as suggested, but the difficulty, where the ship was navigated by the shipowner and his [425 servants, of proving negligence. Therefore, the only exception to the liability of the carrier by sea was when the damage was occasioned by a cause so violent and immediate in its nature and results as that no question of negligence could arise. It must be something about which there could be no doubt and dispute as to its being the sole cause. The intention was to avoid all doubtful and complex questions as to how far the diligence of the shipowner could

(1) 1 T. R., 27.

(2) 4 Doug., 287; 3 Esp., 127.

(3) Law Rep., 4 C. P., 206.

(4) 6 Johns. (N.Y.), 160.

(5) Law Rep., 10 Ex., 255.

(6) Law Rep., 7 Ex., 373.

(7) Law Rep., 7 C. P., 655.

(8) 1 Str., 127.

(9) 21 Wendell, 190.

(10) Law Rep., 1 Q. B., 115.

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have prevented the result of the operation of nature, with respect to which the person whose goods were carried would be at a great disadvantage. Here the operation of nature was not so extraordinary and violent as properly to be called the act of God, and the result did not follow so immediately upon it as to preclude all question of human intervention. Taking the definition suggested by the other side, there was abundance of human intervention in this case. [They cited *Lavaroni v. Drury* (*); *Kay v. Wheeler* (*); *Smith v. Shepherd* (*); *Oakley v. Portsmouth and Ryde Steam Packet Co.* (*); *Riley v. Horne* (*); *Laurence v. Aberdeen* (*); *Gabay v. Lloyd* (*); Kent's Commentaries, vol. ii, 8th ed., pp. 784, 785.]

Benjamin, Q.C., in reply.

Cur. adv. vult.

May 29. The following judgments were delivered:

COCKBURN, C.J.: This case involves a question of considerable importance as regards the law relating to carriers by sea, but the facts are few and simple. The plaintiff, being the owner of two horses, and having occasion to send them from London to Aberdeen, shipped them on board a steamship belonging to the company of which the defendant is the representative, plying regularly as a general ship between the two ports. The horses were shipped without any bill of lading. In the course of the voyage a storm of more than ordinary violence arose; and partly from the rolling of 426] the vessel in the heavy sea, partly from *struggling caused by excessive fright, one of the animals, a mare, received injuries from which she died. It is to recover damages in respect of her loss that this action is brought.

The jury, in answer to a question specifically put to them, have expressly negatived any want of due care on the part of the defendant, either in taking proper measures beforehand to protect the horses from the effects of tempestuous weather, or in doing all that could be done to save them from the consequences of it after it had come on. A further question put to the jury was, whether there were any known means, though not ordinarily used in the conveyance of horses by people of ordinary care and skill, by which the defendant could have prevented the injury to the mare, but to this question the jury returned no answer.

(¹) 8 Ex., 166; 22 L. J. (Ex.), 2.

(²) Law Rep., 2 C. P., 802.

(³) Abbott on Shipping, 11th ed., p. 328.

(⁴) 11 Ex., 618; 25 L. J. (Ex.), 99.

(⁵) 5 Bing., 217.

(⁶) 5 B. & Ald., 107.

(⁷) 3 B. & C., 793.

The question is, whether, on this state of facts, the ship-owners are liable.

For the defendant, it was insisted that the storm, which was the primary, and in a partial degree the proximate, cause of the loss, must be taken to have been an "act of God" within the legal meaning of that term, so as, all due care having been taken to convey the mare safely, to afford immunity to the defendant's company as carriers from liability in respect of the loss complained of; and the question to be determined is, whether this contention is well founded.

The judgment of the Common Pleas Division in favor of the plaintiff, as delivered by Mr. Justice Brett, involves, if I rightly understand it, the following propositions: 1. That the Roman law relating to bailments has been adopted by our courts as part of the common law of England; 2. That, by the Roman law, the owners of all ships, whether common carriers or not, are equally liable for loss by inevitable accident; 3. That such is the rule of English law as derived from the Roman law, and as evidenced by English authorities; 4. That, to bring the cause of damage or loss, within the meaning of the term "act of God," so as to give immunity to the carrier, the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the defendant could not, by any amount of ability, foresee would happen, or, if he could foresee that it would happen, he could not by any amount of care and skill resist, so as to prevent its effect; 5. That, notwithstanding *the lia- [427 bility of the jury to agree to an answer to the fifth question left to them, the defendant has in this case failed to satisfy the burden of proof cast upon him, so as to bring himself clearly within the definition, as it is impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred.

In no part of this reasoning am I able to concur. But before I proceed to deal with it, I must observe that, as the vessel by which the mare was shipped was one of a line of steamers plying habitually between given ports and carrying the goods of all comers as a general ship, and as from this it necessarily follows that the owners were common carriers, it was altogether unnecessary to the decision of the present case to determine the question so elaborately dis-

cussed in the judgment of Mr. Justice Brett as to the liability of the owner of a ship, not being a general ship, but one hired to carry a specific cargo on a particular voyage, to make good loss or damage arising from inevitable accident. The question being, however, one of considerable importance—though its importance is materially lessened by the general practice of ascertaining and limiting the liability of the shipowner by charterparty or bill of lading—and the question not having before presented itself for judicial decision, I think it right to express my dissent from the reasoning of the court below, the more so as, for the opinion thus expressed, I not only fail to discover any authority whatever, but find all jurists who treat of this form of bailment carefully distinguishing between the common carrier and the private ship. Parsons, a writer of considerable authority on this subject, defines a common carrier to be “one who offers to carry goods for any person between certain termini and on a certain route.” “He is bound to carry for all who tender to him goods and the price of carriage, and insures these goods against all loss but that arising from the act of God or the public enemy, and has a lien on the goods for the price of the carriage.” “If either of these elements is wanting, we say the carrier is not a common carrier, either by land or by water.” “If we are right in this,” he adds, “no vessel will be a common carrier 428] that does not ply regularly, alone or in *connection with others, on some definite route, or between two certain termini” (1). Story seems to be of a like opinion. “When it is said,” he observes, “that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships, or for the transportation of merchandise for persons in general, such as vessels employed in the coasting trade, or foreign trade, or on general freighting business, for all persons offering goods on freight for the port of destination.” “But if the owner of a ship employs it on his account generally, or if he lets the tonnage, with a small exception, to a single person, and then, for the accommodation of a particular individual, he takes goods on board for freight, not receiving them for persons in general, he will not be deemed a common carrier, but a mere private carrier” (2). So Angell, speaking of shipowners as common carriers, says: “When it is said that the owners and masters of ships are treated as common carriers, it is to be understood of such ships as are employed for the transportation of merchandise for all

(1) Parsons, Shipping, p. 245.

(2) Story on Bailments, s. 501.

persons indifferently. Should the owner of a ship employ it on his own account, and for the special accommodation of a particular individual, take goods on board for freight, not receiving them from all persons indifferently, he does not come within the definition of a common carrier, he not holding himself out as engaged in a public employment" (*). But the learned author does not say what would be the case where a shipowner holds himself out as ready to send his vessel with cargo to any place that may be agreed on, on a private bargain, and not as a general ship.

In the absence of all common-law authority for the proposition that by the law of England every carrier by sea is subject to the same liability as the common carrier, as asserted in the judgment below, the authority of the Roman law is invoked; but this law, on which so much stress is laid in the judgment of the Court of Common Pleas, affords no support to this doctrine. In the first place, it is a misapprehension to suppose that the law of England relating to the liability of common carriers was derived from the Roman law; for the law relating to it was first established by our courts with reference to carriers by land, on whom the Roman law, as is well known, imposed no liability [429 in respect of loss beyond that of other bailees for reward. In the second place, the Roman law made no distinction between inevitable accident arising from what in our law is termed the "act of God" and inevitable accident arising from other causes, but, on the contrary, afforded immunity to the carrier, without distinction, whenever the loss resulted from "*casus fortuitus*," or, as it is also called, "*damnum fatale*," or "*vis major*"—unforeseen and unavoidable accident. The language of the Prætorian Edict, as given in the Digest, might indeed, if it stood alone, lead to the supposition that the liability of the carrier by sea was unlimited: "*Ait prætor: nautæ, caupones, stabularii quod cujusque saluum fore receperint, nisi restituant, in eos iudicium dabo*" (Dig. iv, tit. 9). But Ulpian, who gives the words quoted in his treatise on the Edict, explains their meaning: "*Hoc edicto omni modo qui recepit tenetur, etiam si sine culpa ejus res perit vel damnum datum est, nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari. Idem erit dicendum si in stabulo aut in caupona vis major contigerit.*"

In the one case the absence of *culpa* makes no difference. In the other it does. No difference of opinion exists among

(*) Angell on Carriers, a. 89.

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civilians as to the law on this subject. There is no doubt that inevitable accident—*damnum fatale, casus fortuitus, vis major*—for these are synonymous terms—exempt the carrier from liability. “*Casus fortuitus*,” says Averani, “*appellatur vis major, vis divina, fatum, damnum fatale, fatalitas*.”

Such is the Roman law, and such is the existing law of all the nations which have adopted the Roman law—France, Spain, Italy, Germany, Holland, and, to come nearer home, Scotland. It is embodied in the Code Civil of France. Treating of carriers by land and by water the Code says (Art. 1754): *Ils sont responsables de la perte et des avaries des choses qui leur sont confiées, à moins qu'ils ne prouvent qu'elles ont été perdues et avariées par cas fortuit ou force majeure.*”

That such is the law of Scotland we learn from what is said in Erskine's Institutes, pp. 591, 592, n., from which it appears that by that law, not only storm and pirates, but 430] also housebreaking and *fire, constitute *damnum fatale*, which will exonerate the innkeeper or carrier. (See also the Appendix to Stair's Institutes, by More, p. 57.) But not only does this essential difference between the Roman law and our own suffice to show that, so far as the liability of carriers is concerned, our law has not been derived from the Roman: as matter of legal history we know that the more rigorous law of later times, first introduced during the reign of Elizabeth, was, in the first instance, established with reference to carriers by land to whom by the Roman law no such liability attached. It was not till the ensuing reign, in the eleventh of James I, that it was decided, in *Rich v. Kneeland* (¹), that the common hoyman or carrier by water stood on the same footing as a common carrier by land, and rightly, for in principle there could be no difference between them. The next case in point of date, and it is the first case in the books in which the liability of the owner of a sea-going ship comes in question, is the well-known case of *Morse v. Slue* (²), in which it was held, after a trial at bar, that where a ship lying in the Thames was boarded by robbers, who took the plaintiff's goods which had been loaded on board, in an action brought against the master, the plaintiff was entitled to recover. And it certainly surprises me that this case should be relied on as an authority for the position that the liability of a common carrier attaches to the shipowner or master where the ship is not a general ship; for though it is not expressly said

(¹) Cro. Jac., 330; Hob., 17.

(²) 1 Vent., 190, 238.

that the ship in question was a general ship, which has led to the somewhat hasty assumption that she was not, the internal evidence shows conclusively that she was so. In the first place, the declaration is laid on the custom of the realm, and we know that the only custom to which effect had up to that time been given—and that quite in recent times—was in respect of common carriers by land, and still more recently in respect of common carriers by water. Secondly, Hale, C.J., in giving judgment, puts the case as on all fours with that of a common carrier or hoyman, and nowhere says that it is to be treated as that of a private ship. “He who would take off the master from this action,” says the Chief Justice, “must assign a difference between it and the case of a hoyman, common carrier, *or innholder.” Doubtless the counsel for the de- [431] fendant, if the case had been distinguishable on the ground that the vessel was not a common ship, would have pointed out the difference, and at all events have taken the point; and in the corresponding report of the same case in *Levinz* (*), the case of *Rich v. Kneeland* (*) having been referred to, the Chief Justice is reported to have said that the case “differed not from that of the hoyman.” But in the case of *Rich v. Kneeland* (*) we know that the barge or hoy was a common carrier; and it is obvious that if in *Morse v. Slue* (*) the vessel had been a private one, instead of treating the case as identical with that of the common hoyman, the Chief Justice would have put it on the ground that all sea-going vessels were subject to the larger liability. But besides this, there is a circumstance which appears to have been overlooked, which seems decisive to show that the ship must have been a general ship. It is mentioned in the report in *Ventris*, that the ship was a vessel of 150 tons burden, bound for Cadiz, and that the goods shipped by the plaintiff consisted of three trunks, containing 400 pairs of silk stockings and 174 lbs. of silk. It seems idle to suppose that a ship of that size would have been hired on such a voyage for the purpose of carrying the plaintiffs three trunks as her entire cargo. There seems, therefore, no reasonable doubt that the ship was a general ship. In like manner, in the case of *Dale v. Hall* (*), although the declaration was not upon the custom of the realm, but upon the implied obligation to carry safely, it appearing that the defendant was a shipmaster or keelman who carried goods from port to port, the court decided in favor of the plaintiff,

(*) 2 Lev., 69.

(*) Cro. Jac., 330; Hob., 17.

(*) 1 Vent., 190, 238.

(*) 1 Wils., 281.

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expressly on the liability of the defendant as a common carrier (though the latter was prepared to show an absence of negligence on his part), on the ground that the allegation of the duty of a common carrier "to carry safely" was equivalent to a declaration on the custom of the realm. In the subsequent case of *Barclay v. Cuculla y Gana* (¹), which was a case where, as in *Morse v. Slue* (²), goods had been forcibly taken by thieves from a ship lying in the Thames, on the objection being taken on behalf of the defendant *that he was not charged in the declaration on the custom of the realm, while there was neither express undertaking nor negligence to make him liable otherwise, the answer of the court was "that there was no question at the trial as to the ship being a general ship;" and Lord Mansfield adds that it was impossible to distinguish the case from that of a common carrier.

Thus far the reported cases as to carriers by sea have been cases of general vessels. The next in point of time, that of *Lyon v. Mells* (³), was one in which the defendant kept sloops for carrying other persons' goods for hire, and also lighters for carrying such goods to and from his sloops as well as to and from the sloops of other owners. One of these lighters, in which goods of the plaintiff were being conveyed on board a sloop, proved leaky and took in a quantity of water, and the goods became seriously damaged, and it was also found as a fact that the goods had been negligently stowed. The defendant relied on a notice that he would not be answerable for any loss or damage unless occasioned by want of ordinary care of the master and crew, in which case he would pay 10 per cent. on the loss or damage; but that persons desirous of having their goods carried free from any risk in respect of loss or damage, whether arising from the act of God or otherwise, might have them so carried on entering into an agreement to pay extra freight in proportion to the risk. No extra freight having been paid, the question was whether the defendant was protected by this notice from liability for more than 10 per cent. of the damage. Nothing in reality turned upon his being a common carrier or subject to the liabilities of a common carrier. Some discussion, it is true, took place on the argument as to whether the defendant was a common carrier or not; but Lord Ellenborough, in giving judgment, put the matter on the right footing, namely, that a carrier by water impliedly engages that his vessel shall be water-tight, an obligation obviously applicable to all carriers, whether common car-

(¹) 3 Doug., 389.(²) 1 Vent., 190, 238.(³) 5 East, 428.

riers or otherwise, and that the defendant could not be taken to have intended by such a notice to claim immunity in respect of his own breach of contract, but only immunity above 10 per cent. for loss or damage arising from the negligence of the master and crew, and total immunity in respect of loss or damage from the act of God or other *cause, [433 unless extra freight was paid. The owner no doubt thought his liability that of a common carrier, and, as Lord Ellenborough points out, sought to protect himself accordingly; but Lord Ellenborough nowhere treats him as such, but decides the case on a general ground applicable to all carriers, whether common or private. Yet this case is relied on, erroneously as it appears to me, as showing that a man who lets out a lighter or ship, not to carry the goods of general comers, but to a particular individual on a specific job or contract, if his business be to let out lighters or ships, is a common carrier, or is at all events subject to an equal degree of liability. The last case is that of the *Liver Alkali Co. v. Johnson* (¹), in which the defendant was a barge owner and let out his vessels for conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply between any fixed termini, but the customer fixed in each particular case the points of arrival and departure. In an action against the defendant by the plaintiffs for not safely and securely carrying certain goods, the Court of Exchequer Chamber held, affirming the judgment of the Court of Exchequer, that the defendant was a common carrier and liable as such. Mr. Justice Brett, differing from the majority, held that the defendant was not a common carrier, but, asserting the same doctrine as in the judgment now appealed from, held him liable upon a special custom of the realm attaching to all carriers by sea, of which custom, however, as I have already intimated, I can find no trace whatever. We are, of course, bound by the decision of the Court of Exchequer Chamber in the case referred to as that of a court of appellate jurisdiction, and which, therefore, can only be reviewed by a court of ultimate appeal; but I cannot help seeing the difficulty which stands in the way of the ruling in that case, namely, that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it never has been held, and, as it seems to me, could not be held, that a person who lets out vessels or vehicles to indi-

(¹) Law Rep., 9 Ex., 338.

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vidual customers on their application was liable to an action for refusing the use of such vessel or vehicle if required 434] to *furnish it. At all events, it is obvious that as the decision of the Court of Exchequer Chamber proceeded on the ground that the defendant in that case was a common carrier, the decision is no authority for the position taken in the court below, that all ship owners are equally liable for loss by inevitable accident. It is plain that the majority of the court did not adopt the view of Mr. Justice Brett. Lastly, while it does not lie within our province to criticise the law we have to administer or to question its policy, I cannot but think that we are not called upon to extend a principle of extreme rigor, peculiar to our own law, and the absence of which in the law of other nations has not been found by experience to lead to the evils for the prevention of which the rule of our law was supposed to be necessary, further than it has hitherto been applied. I cannot, therefore, concur in the opinion expressed in the judgment delivered by Mr. Justice Brett, that by the law of England all carriers by sea are subject to the liability which by that law undoubtedly attaches to the common carrier whether by sea or by land.

But there being no doubt that in the case before us the shipowner was a common carrier, we have now to deal with the question on which the decision really turns, namely, whether the loss was occasioned by what can properly be called the "act of God."

The definition which is given by Mr. Justice Brett, of what is termed in our law the "act of God" is, that it must be such a direct, and violent, and sudden, and irresistible act of nature as could not by any amount of ability have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted. The judgment then proceeds: "We cannot say, notwithstanding the inability of the jury to agree to an answer to the fifth question left to them, that the defendant has in this case satisfied the burden of proof cast upon him so as to bring himself clearly within the definition. It seems to me impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred."

The exposition here given appears to me too wide as regards 435] the degree of care required of the shipowner, and as exacting more than can properly be expected of him.

It is somewhat remarkable that previously to the present case no judicial exposition has occurred of the meaning of the term "act of God," as regards the degree of care to be applied by the carrier in order to entitle himself to the benefit of its protection. We must endeavor to lay down an intelligible rule.

That a storm at sea is included in the term "act of God," can admit of no doubt whatever. Storm and tempest have always been mentioned in dealing with this subject as among the instances of *vis major* coming under the denomination of "act of God." But it is equally true, as has already been pointed out, that it is not under all circumstances that inevitable accident arising from the so-called act of God will, any more than inevitable accident in general by the Roman and continental law, afford immunity to the carrier. This must depend on his ability to avert the effects of the *vis major*, and the degree of diligence which he is bound to apply to that end.

It is at once obvious, as was pointed out by Lord Mansfield in *Forward v. Pittard* ⁽¹⁾, that all causes of inevitable accident—"casus fortuitus"—may be divided into two classes—those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term "act of God" to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term "act of God" is properly applicable.

On the other hand, it must be admitted that it is not because an accident is occasioned by the agency of nature, and therefore by what may be termed the "act of God," that it necessarily follows that the carrier is entitled to immunity. The rain which fertilises the earth and the wind which enables the ship to navigate the ocean are as much within the term "act of God" as the rainfall which causes a river to burst its banks and carry destruction over a whole district, or the cyclone that drives a ship [436 against a rock or sends it to the bottom. Yet the carrier who by the rule is entitled to protection in the latter case, would clearly not be able to claim it in case of damage occurring in the former. For here another principle comes

(1) 1 T. R., 27.

into play. The carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails herein he becomes liable from the nature of his contract. In the one case he can protect the goods by proper care, in the other it is beyond his power to do so. If by his default in omitting to take the necessary care, loss or damage ensues, he remains responsible, though the so-called act of God may have been the immediate cause of the mischief. If the ship is unseaworthy, and hence perishes from the storm which it otherwise would have weathered; if the carrier by undue deviation or delay exposes himself to the danger which he otherwise would have avoided; or if by his rashness he unnecessarily encounters it, as by putting to sea in a raging storm, the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of the exception. This being granted, the question arises as to the degree of care which is to be required of him to protect him from liability in respect of loss arising from the act of God. Not only, as has been observed, has there been no judicial exposition of the meaning of the term "act of God," as regards the degree of care to be applied by the carrier in order to entitle himself to its protection, but the text-writers, both English and American, are, for the most part, silent on the subject and afford little or no assistance. Being here, however, on common ground with the civilians, so far as one head of inevitable accident is concerned, it may be of use, while endeavoring more clearly to fix the limits of that class of inevitable accidents which comes under the head of "act of God," to turn to their views on the subject with reference to inevitable accidents in general. As the result of the different instances of *casus fortuitus* which occur in the Digest, Vinnius gives the following definition: "*Casum fortuitum definimus omne quod humano cœptu prævideri non potest, nec cui proviso potest resisti*" (Partit. Juris., lib. ii, c. 66). He enumerates various instances: "*Casus fortuiti varii sunt: veluti a vi ventorum, turbinum, pluviarum, grandinum, fulminum, æstus, frigoris, et similium calamitatum quæ cœlitus immittuntur*" [437]. "*Nostri vim divinam dixerunt. Græci, Θεοῦ βλαβή*. Item naufragia, aquarum inundationes, incendia, mortes animalium, ruinæ ædium, fundorum chasmata, incursus hostium, prædonum impetus. His adde damna omnia privatis illata, quæ quominus inferrentur nullâ curâ caveri potest." Baldus (Quæst. 12 no. 4), gives the following definition: "*Casus fortuitus est accidens, quod per custo-*

diam, curam, vel diligentiam mentis humanæ non potest evitari ab eo qui patitur."

In our own law on this subject judicial authority, as has been stated, is wanting, and the text-writers, English and American, with one exception, afford little or no assistance. Story, however, in speaking of the perils of the sea, in which storm and tempest are of course included, and consequently to a great extent the instances of inevitable accident at sea which come under the term "act of God," uses the following language: "The phrase 'perils of the sea,' whether understood in its most limited sense, as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents occurring upon that element, must still in either case be understood to include such losses only to the goods on board as are of an extraordinary nature or arise from some irresistible force, or from inevitable accident, or from some overwhelming power which cannot be guarded against by ordinary exertions of human skill and prudence. Hence it is that if the loss occurs by a peril of the sea which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party" ('). Story, it will be observed, here speaks only of "ordinary exertion of human skill and prudence and the exercise of reasonable skill and diligence." In my opinion this is the true view of the matter, and what Story here says of perils of the sea applies, I think, equally to the perils of the sea coming within the designation of "acts of God." In other words, all that can be required of the carrier is that he shall do all that is reasonably and practically possible *to insure [438 the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God. I do not think that because some one may have discovered some more efficient method of securing the goods which has not become generally known, or because it cannot be proved that if the skill and ingenuity of engineers or others were directed to the subject something more efficient might not be produced, that the carrier can be made liable.

(') Story on Bailments, 512 (a).

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I find no authority for saying that the *vis major* must be such as "no amount of human care or skill could have resisted," or the injury such as "no human ability could have prevented," and I think this construction of the rule erroneous. That the defendants here took all the care that could reasonably be required of them to insure the safety of the mare is, I think, involved in the finding of the jury, directly negating negligence, and I think that it was not incumbent on the defendants to establish more than is implied by that finding.

The matter becomes, however, somewhat complicated from the fact that the jury have found that the death of the mare is to be ascribed to injuries caused partly by the rolling of the vessel, partly by struggles of the animal occasioned by fright, leaving it doubtful whether the fright was the natural effect of the storm or whether it arose from an unusual degree of timidity peculiar to the animal and in excess of what would generally be displayed by horses. But the plaintiff is in this dilemma: if the fright which led to the struggling of the mare was in excess of what is usual in horses on ship-board in a storm, then the rule applies that the carrier is not liable where the thing carried perishes or sustains damage, without any fault of his, by reason of some quality inherent in its nature, and which it was not possible for him to guard against. If, on the other hand, the fright was the natural effect of the storm and of the agitation of the ship, then it was the immediate consequence of the storm, and the injuries occasioned by the fright are sufficiently closely connected with the storm, in other 439] *words with the act of God, to afford protection to the carrier. If the disaster is the result of a combination of causes for neither of which the carrier was responsible, he cannot be made liable any more than if it had resulted from either of them alone.

For these reasons I am of opinion that the judgment of the court below must be reversed, and judgment entered for the defendant.

MELLISH, L.J.: I do not wish to give any opinion on the question whether the defendant, if he had not been a common carrier, would have been subject to the liability of a common carrier. It is unnecessary to give any opinion on that question, because it was admitted in the argument before us that the defendant was a common carrier. I agree with the Lord Chief Justice that the judgment of the Common Pleas Division ought to be reversed, and generally with the reasons he has given in his judgment. If the jury

had found that the injury to the mare was caused solely by more than ordinary bad weather, without any negligence of the defendant's servants, or any fright and consequent struggling of the mare, I am of opinion that a plea that the injury to the mare was caused by the act of God would have been proved. It is obvious that if a horse is properly secured on deck and properly attended to by the carrier's servants, and is quiet, and nevertheless is so injured as to be killed by the pitching of the vessel, the violence of the storm must be very great indeed, and the whole accident would be of such an extraordinary character as plainly to amount to the act of God within the authorities. So also, if the jury had found that the injury was caused solely by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence on the part of the defendant's servants, I am of opinion that a plea that the injury to the mare was caused by the vice of the mare herself would have been proved.

The cases of *Kendall v. London and South Western Ry. Co.* (1) and *Blower v. Great Western Ry. Co.* (2) are direct authorities to this effect. Now if these conclusions are correct, it seems to me it *would be absurd to hold [440 that although the injury to the mare was occasioned by two causes combined, for neither of which the carrier was responsible, nevertheless he was liable.

It may no doubt be true that, as the injury of the mare was not solely occasioned by more than ordinary bad weather, the bad weather may not have been so bad as to deserve the description of a direct, and violent, and sudden, and irresistible act of nature, which in the court below it was said it must amount to, in order to amount to an act of God.

The bad weather may not have been irresistible, because if it had not been for the conduct of the mare herself, it might have been resisted, so also the conduct of the mare herself may not have been the sole and irresistible cause of the injury, because if it had not been for the bad weather, any injurious effect from the fright and struggling of the mare might by reasonable precautions have been prevented.

Still it may be perfectly true, and I think the jury must be taken to have found it was true, that the more than ordinary bad weather, and the fright and struggling of the mare herself, did together form a direct, and violent, and irresistible cause of the damage which the mare suffered. In the

(1) Law Rep., 7 Ex., 373.

(2) Law Rep., 7 C. P., 755.

court below, the learned judges first consider the question whether the loss in this case can be considered to have occurred by the act of God, and, because the bad weather did not, in their opinion, amount to a direct, and violent, and sudden, and irresistible act of nature, they come to the conclusion that the loss was not occasioned by the act of God. They then consider whether the loss was occasioned by the vice of the mare herself, and because they think that the fright and struggling of the mare was occasioned principally by the bad weather, they hold that the loss was not occasioned by the vice of the mare herself. The objection to this mode of considering the case seems to me to be that the two causes of loss are considered separately, and because neither, taken separately, affords an answer to the plaintiff's claim, it is assumed that both taken together cannot afford an answer. Now, I am of opinion we ought to hold that, notwithstanding neither the more than ordinary bad weather, nor the fright and struggling of the mare 441] herself, each *taken separately, were sufficient to account for the loss; yet, if both taken together formed an irresistible cause of the loss in this sense, that by no reasonable precaution on the part of the carrier could the damage resulting from them have been prevented, the carrier is protected. It being a clear rule of law, that if the loss of the goods carried is occasioned by an irresistible act of nature, the carrier is protected; and another clear rule of law, that if the loss of the goods is solely occasioned by a defect in the thing itself, the carrier is also protected; it seems to me to follow that, if the loss is occasioned partly by an act of nature, although one not by itself irresistible, and partly by a defect in the thing itself, although that defect is not the sole cause of the loss, and the carrier has no means of preventing the combined effect of the two causes, he ought to be held to be protected.

The principle seems to me to be that a carrier does not insure against acts of nature, and does not insure against defects in the thing carried itself, but in order to make out a defence the carrier must be able to prove that either cause, taken separately, or both taken together, formed the sole and direct and irresistible cause of the loss. I think, however, that in order to prove that the cause of the loss was irresistible, it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but that it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented. For these reasons I am of opinion that the judgment of the court below ought

to be reversed, and the rule to enter a verdict for the plaintiff discharged.

CLEASBY, B.: I should hesitate to decide this case upon the general ground, much insisted on during the argument, that where there is a loss or destruction of anything intrusted to a carrier from natural causes, without the intervention of any human agency, the carrier is discharged. In other words, that the exception of "the act of God" from the carrier's responsibility applied to every condition of things resulting from natural causes. The words "act of God," as applied to the carrier's exemption, comprehend no doubt such events as earthquakes, and all other convulsions of *nature. Violent storms and tempests have always [442 been considered as coming within the words, and men have thought they could avert them by prayers and offerings. Mr. Wallace, the American editor of *Smith's Leading Cases*, as cited in the note to *Angell on Carriers*, s. 155 (p. 153), attempts a definition. "Upon the whole it would seem that the act of God signifies the extraordinary evidence of nature."

This entirely disapproves of those two American cases referred to in the argument, *Colt v. McMechen* ⁽¹⁾ and *Williams v. Grant* ⁽²⁾, which appeared to go to the extent of showing that "act of God" and "act of Nature" meant the same thing. I mean, of course, "act of God" as applied to the carrier's exception. I would not adopt this or any definition as exact and including all cases, but wherever there is that unusual violence of nature, against which, in the opinion of the jury, precautions would be considered unavailing, and could not be expected to be taken, I should say the case would come within the exception. Now how does the present case stand as regards this?

I should have been better satisfied if the note of the case had shown more distinctly that there had been in this case the intervention of the act of God in the sense which I have mentioned.

Still, looking at the language of the questions put to the jury, and the answers, it is a fair conclusion, I think, that weather was of such a nature "more than ordinary bad weather," as to come within the meaning of "act of God." It seems to have been argued in that way, and if that be so, the judgment of the court below is subject to this criticism, that though the carrier is excused by the "act of God," he is yet bound to use precautions against the "act of God." This seems an inconsistency, and I should feel fully justi-

⁽¹⁾ 6 Johns. Rep. (N.Y.), 160.

⁽²⁾ 1 Conn., 487.

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fied in saying that if the "act of God" and the nature of the animal combined to produce the injury, the defendants would be discharged.

The fifth question asks, "were there known means not ordinarily used in the carriage of horses by sea by people of ordinary care and skill, by which the injury might be 443] prevented?" It is *not surprising the jury could not agree upon an answer to this question. Some would say it must be possible to use means to attain this end, and of course they could not be unknown contrivances, but known to persons of skill, and this would lead to one answer; others would say the only known means, in the proper sense of the words, were means in use, that is in ordinary use, and this would lead to an opposite answer. It does not appear to me that an answer to that question was essential to determine the case, because, whichever way it was answered, the answers to the other questions, particularly the fourth, determine the case in favor of the defendants. I consider it expressly found that there was no negligence on the part of the defendants in any way contributing to the injury.

If the second question had been answered in the affirmative, the case would have come within the authority of decided cases. Carriers of live animals are not, as such, without negligence, responsible for injury to or death of the animals carried by themselves: *Blower v. Great Western Ry. Co.* (1); *Kendall v. London and South Western Ry. Co.* (2). But in the present case it appears that the injuries were due to two causes together, the rough weather and the nature of the animal. If the extraordinary rough weather can be regarded as the act of God within the meaning of those words in the exception, then, as I have before stated, the case appears clear; but if it be not, still as the jury have negatived negligence in their answer to the fourth question, it amounts to this, that the defendants took all reasonable and proper precautions against rough weather, but still the extraordinary bad weather and nature of the animal caused the injury. This, in my opinion, is sufficient to absolve the carriers; because all negligence being negatived, they cannot be said in any way to have contributed to the injury, and so far as being carriers they are insurers, this liability does not extend to injuries caused by the animals themselves, and even though the extraordinary rough weather may have contributed directly, yet no correct conclusion could be founded upon the joint operation of the two

(1) Law Rep., 7 C. P., 755.

(2) Law Rep., 7 Ex., 373.

causes, as no division could be made of the result caused by each. The third *finding negatives the injury [444 being caused by the rough weather alone; and as it follows that the character and conduct of the animal must have been an effective cause, the sounder conclusion seems to be that the plaintiff fails in making out a case to recover anything, rather than that the defendants are to be made responsible for the whole consequences of both causes combined.

The effect of this opinion is that the judgment of the court below should be reversed.

MELLISH, L.J., stated that James, L.J., concurred that the decision of the court below must be reversed, and desired to add the following observation. The "act of God" is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him. In this case the defendant has made this out.

MELLOR, J., agreed that the judgment of the court below must be reversed.

Judgment reversed.

Solicitors for plaintiff: *Lawrence, Plews & Boyer.*

Solicitors for defendant: *Lyne & Holman.*

See 15 Eng. Rep., 218; also note to *River, etc., v. Adamson*, ante, p. 200.

[1 Common Pleas Division, 445.]

Feb. 11, 1876.

*FARMELOE and Another v. BAIN and Another. [445]

Contract of Sale—Unappropriated Goods—Undertaking to deliver to Vendee's Order—Unpaid Vendor—Estoppel.

The defendants sold to B. & Co. 100 tons of zinc (unappropriated) upon certain terms of payment, giving them at the time of the contract four several documents to the following effect: "We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc off your contract of this date." Upon the faith of these documents, the plaintiffs bought of B. & Co., and paid for, fifty tons of the zinc mentioned in the contract. B. & Co. having failed, and the contract price being unpaid, the defendants refused to deliver the zinc:

Held, that the giving of these delivery orders or "undertakings" did not estop the defendants from setting up, as against the vendees of B. & Co., their right as unpaid vendors to withhold delivery.

DETINUE and trover for fifty tons of zinc, and damages for the detention: claim, £3,000.

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Pleas, to the first count,—1. Non detinet,—2. Not possessed,—3. That before the alleged detention the defendants sold the goods to Messrs. Burrs & Co. at and for a certain price payable for the same by Burrs & Co. to the defendants, and afterwards, and before the alleged detention, Burrs & Co. were insolvent and unable to pay their debts or the said price, and stopped payment, and the goods never were delivered, but from the time of the said sale up to and at the time of the alleged detention, and thenceforth hitherto remained in the possession of the defendants as such vendors as aforesaid, and the price during all that time remained unpaid to the defendants; that the plaintiffs never had any right or title in or to the goods save under and through Burrs & Co.; and that thereupon the defendants detained the goods from the plaintiffs, the price never having been paid or tendered to the defendants, as a lien or security for the payment thereof, all conditions being fulfilled and existing requisite to make the same valid, which was the alleged detention,—4. The defendants detained the goods as alleged under and by virtue of a lien of the defendants on the same for the payment of the price thereof to the defendants as and being the sellers of the goods, the defendants never having delivered the goods or parted with the possession thereof, and the price being payable at or 446] before the delivery of *the goods and never having been paid or tendered to the defendants, and such lien then being subsisting and in force, and available and valid against the plaintiffs.

Pleas to the second count, not guilty, and not possessed.

The plaintiffs took and joined issue on all the pleas; and, for a second replication on equitable grounds, to the third plea, said that the defendants at the time of the sale of the goods to Burrs & Co. traded under the name, style, and firm of "The Harford and Bristol Brass Company," and that they ought not to be admitted to plead the said plea, because, at the time of the sale by the defendants of the goods to Burrs & Co., the defendants made and gave to Burrs & Co. two written undertakings for the delivery of the said goods, each in the words and figures following: "Golden Heart Wharf, Dowgate, London, 31st of December, 1873, E.C. Messrs. Burrs & Co., 61 Gracechurch Street. We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc, off your contract of this date. Harford & B. B. Co., per E. G. Wilson;" that the defendants signed the said undertakings by their lawfully authorized agent, E. G. Wilson, thereby

intending that the same should operate as a representation to all persons to whom the same should be shown that the goods therein mentioned were the property of Burrs & Co. free from all lien or claim whatsoever on the part of the defendants; that such undertakings were indorsed and delivered to the plaintiffs by Burrs & Co. when they purchased and paid for the said goods; that it was upon the faith of the said representation and of such undertakings that the plaintiffs purchased of and paid for the said goods to Burrs & Co., and not otherwise, and which purchase-money of £1,475 had never been returned to the plaintiffs, and the said contract was still in force.

To this equitable replication the defendants demurred, on the grounds that "the document set out did not amount to a representation that Burrs & Co. were possessed of the goods mentioned in the declaration, or an engagement that the defendants would waive their lien, nor did the replication show that the plaintiffs were misled." Joinder.

The cause was tried before Denman, J., at the sittings in London after Trinity Term, 1875. The facts were as follows: On the 31st of December, 1873, the defendants, who traded under the name of The Harford and Bristol Brass Company, sold to Messrs. Burrs & Co. 100 tons of sheet zinc, and on the same day addressed to them a letter, as follows:

*"Golden Heart Wharf, Dowgate,
"London, 31st December, 1873.*

"Messrs. Burrs & Co.

"Dear sirs,—We beg to confirm the sales made you this day of merchantable sheet zinc, viz.:

"50 tons at £32 15s., less 2½ and 1 per cent., payable half on 7th, remainder 14th February next.

"50 tons at £33, less 1½ and 1 per cent., payable by your draft on Messrs. Pitchford & Co., at three months date from first of January, indorsed over to us; and we inclose a statement of the amount of the draft, £1,612 17s. 6d.

(Signed) "HARFORD B. & B. Co.,
"Per E. G. Wilson."

On the 1st of January, 1874, Burrs & Co. delivered to the defendants a bill for £1,612 17s. 6d. drawn by Burrs & Co. upon and accepted by Pitchford & Co., payable at three months from that day. This bill was dishonored; Burrs & Co. having stopped payment on the 14th of January, and Pitchford & Co. having petitioned the court of bankruptcy on the 16th.

On the 7th of January, 1874, the plaintiffs bought of

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Burrs & Co. 50 tons of sheet zinc (the goods mentioned in the declaration), to be paid for by their acceptances. On the following day Burrs & Co. sent the plaintiffs an invoice of the zinc, together with a common delivery order on the defendants, and two bills for the price, for the plaintiffs' acceptance. Conceiving this delivery order to be insufficient security for the goods, the plaintiffs declined to accept the bills without a specific undertaking from the defendants to deliver them; whereupon Burrs & Co. handed them two documents (signed by the defendants' agent) in the form set out in the second replication to the third plea, being two of four which the defendants had handed to Burrs & Co. upon the making of the original contract of sale. These documents were duly indorsed and delivered by Burrs & Co. to the plaintiffs, who thereupon accepted the bills.

448] *The contract between the defendants and Burrs & Co. was not for the sale of any specific zinc, but of 100 tons to be taken from a quantity which the defendants had on their wharf at the time.

In answer to a question put to them by the learned judge, the jury found that the replication was proved: and he directed a verdict to be entered for the plaintiffs on the replication to the third plea, and for the defendants on not possessed, and also on the fourth plea, giving either party leave to move.

Nov. 3, 1875. *Benjamin*, Q.C., for the defendants, obtained a rule to set aside the verdict for the plaintiffs and to enter a verdict for the defendants on the special replication, on the ground that there was no evidence in support of the verdict; or for a new trial, on the ground that evidence was improperly received in support of the replication, notwithstanding objection by the plaintiffs to the admission of such evidence.

Nov. 6. *Hopwood*, Q.C., for the plaintiffs, obtained a rule to set aside the verdict for the defendants on the plea of not possessed, and to enter a verdict for the plaintiffs as to that plea, or a general verdict for the plaintiffs for nominal damages and delivery of the goods, or damages £1,475; or for a new trial, on the ground that the evidence showed that the defendants were estopped from denying that the property in the 50 tons of zinc passed to and was in the plaintiffs.

Feb. 9, 11, 1876. *Hopwood*, Q.C., and *T. De Courcy Atkins*, for the plaintiffs⁽¹⁾: The plaintiffs having bought the goods of Burrs & Co. upon the faith of the defendants' undertaking to deliver them to the indorsed order of Burrs & Co.,

(1) The demurrer and the rules were taken together.

the defendants are estopped from denying that the goods, though not specifically appropriated at the time of sale, passed to Burrs & Co. by their contract of the 31st of December, 1873; for, they thereby induced the plaintiffs to alter their position to their prejudice, which brings the case within one of the rules as to estoppels *in pais* laid down by this court in *Carr v. London and North Western Ry. Co.* ('). If these documents had been delivery orders in the ordinary form, the case would have been different. But undertakings such as *these, which almost amount to negotia- [449 ble securities, or, at the lowest, to acknowledgments by the wharfingers that they hold the goods in trust for the vendees, could only be given for the purpose of enabling the vendees to resell the goods as if they were the actual and *bona fide* owners of them free from incumbrance. They constitute an absolute and unconditional contract to deliver the goods to whoever may be the indorsee.

[BRETT, J.: Are the defendants estopped from saying that the plaintiffs cannot recover in this action because there is no specific zinc which has been appropriated to Burrs & Co.'s contract?]

The effect of the finding of the jury is that the defendants intended that these documents should operate as the replication alleges that they did, viz., "as a representation to all persons to whom the same should be shown that the goods therein mentioned were the property of Burrs & Co. free from all lien or claim whatsoever on the part of the defendants;" and that the plaintiffs parted with their money upon the faith of that representation.

[BRETT, J.: Does it amount to a representation that there was a specific quantity of zinc ready to be delivered? and did the plaintiffs act upon that representation?]

The jury have so found in terms. The authorities as to estoppel by acts and conduct are all reviewed in the elaborate judgment of Blackburn, J., in *Crouch v. Credit Foncier of England* (').

[BRETT, J.: Your argument would treat these documents as negotiable securities, which they clearly are not.]

[The following cases were also cited: *Woodley v. Coventry* ('); *Dixon v. Bovill* ('); *Higgs v. Northern Assam Tea Co.* ('); *Knights v. Wiffen* ('); *Goodwin v. Roberts* ('); *Re Agra and Masterman's Bank* ('); *Re Blakeley Ordance*

(1) Law Rep., 10 C. P., 307.

(2) Law Rep., 8 Q. B., 374, 378.

(3) 2 H. & C., 164; 32 L. J. (Ex.), 185.

(4) 3 Macq., 1.

(5) Law Rep., 4 Ex., 387.

(6) Law Rep., 5 Q. B., 660.

(7) Law Rep., 10 Ex., 76, 337.

(8) Law Rep., 2 Ch., 391.

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Co., Ex parte New Zealand Banking Corporation (¹); *Re General Estates Co., Ex parte City Bank* (²).]

Benjamin, Q.C., and W. G. Harrison, contra, were not called upon.

BRETT, J.: In this case the plaintiffs sue the defendants 450] in *trover* and *detinue* for goods, which they had bought of Burrs & Co. The defendants' answer to the claim was, that they sold the goods to Burrs & Co. for a certain price, that Burrs & Co. stopped payment, and that the defendants claimed as unpaid vendors to be entitled to withhold delivery. To this the plaintiffs reply that at or immediately after the time the defendants contracted to sell the goods to Burrs & Co., they gave to Burrs & Co. two written undertakings for the delivery of the goods, in the following words,—“We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc off your contract of this date;” that the defendants signed the said undertakings intending that the same should operate as a representation to all persons to whom the same should be shown that the goods therein mentioned were the property of Burrs & Co. free from all claim or lien on the part of the defendants, that such undertakings were indorsed and delivered to the plaintiffs by Burrs & Co. when they purchased and paid for the goods, and that they the plaintiffs purchased of and paid for the goods to Burrs & Co. upon the faith of the said representation and of such undertakings; and therefore it is contended that the defendants are estopped from setting up as against the plaintiffs their right as unpaid vendors to stop the goods. It is admitted that the document in question is not a known document amongst merchants; therefore the court must look at it as they would at any other ordinary written instrument. So looking at it, it obviously contains no representation of any fact, and the plaintiffs had no right to rely upon it as such a representation, and consequently they do not bring themselves within either of the propositions as to estoppel which I ventured to lay down in *Carr v. London and North Western Ry. Co.* (¹), and to which I still adhere. It was a mere undertaking or contract between the plaintiffs and their immediate vendees. Upon the facts of the case, it seems to me that there was no evidence to support the plaintiffs' case, and that the verdict should be entered for the defendants. A subsidiary question remains, viz., whether the replication is good on demurrer. The only representa-

(¹) *Law Rep.*, 3 Ch., 154.(²) *Law Rep.*, 3 Ch., 758.(³) *Law Rep.*, 10 C. P., 307.

tion being that which I have described, I think the replication is had upon the face of it. The plaintiffs' rule will therefore be discharged, and the defendants' rule [45] made absolute, and there will be judgment for the defendants on the demurrer.

ARCHIBALD, J.: I am of the same opinion. Apart from the undertaking referred to in the replication, the defendants were clearly entitled to retain the goods, as unpaid vendors. The remaining question is simple, and the rule of law clear. The plaintiffs seek to get rid of the defendants' right to withhold delivery of the goods by reason of the documents handed to Burrs & Co. at the time of the contract. It has been insisted on their part that those documents amount to a representation that the goods were the goods of Burrs & Co. free from any lien, and that therefore the defendants are estopped from setting up the right which every unpaid vendor has of withholding delivery of the goods. I agree with my Brother Brett that we cannot look at the documents in question as amounting to any such estoppel. They clearly do not contain a representation of any fact which can be relied on as an estoppel. The question raised by the demurrer depends upon the same consideration.

LINDLEY, J.: I am of the same opinion. The question is whether there is anything in the documents relied on by the plaintiffs to estop the defendants from saying that no property in the zinc passed to Burrs & Co. or their vendees, the plaintiffs, by the sale and by the indorsement to them of these delivery orders. The document amounts to no more than this,—“You have a contract with me for the sale of certain zinc; and I am willing to deliver twenty-five tons off that contract, on the terms of that contract.” That clearly does not amount to a representation that Burrs & Co. were at liberty to transfer to their vendees a property in the zinc which they themselves did not possess. The document speaks for itself. The demurrer to the replication turns upon the construction of the document, and must follow the fate of the rules.

Rules and judgment accordingly.

Solicitor for plaintiffs: *E. Draper.*

Solicitor for defendants: *J. T. Davies.*

[1 Common Pleas Division, 452.]

June 25, 1876.

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*LEWIS V. GRAY.

Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), ss. 12, 13, 14, Construction of—Detention of Ship for Unseaworthiness—Form of Order—Appeal.

By a 12 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), it is enacted that, where the Board of Trade have received a complaint or have reason to believe that any British ship is by reason of the defective condition of her hull, &c., or by reason of overloading, &c., *unfit to proceed to sea without serious danger to human life*, they may appoint some competent person or persons to survey her and to report to them, and may if they think fit order her to be detained for survey; and thereupon any officer of customs may detain such ship until her release be ordered either by the board or by any court to which an appeal is given under s. 14 of the act; and, upon receipt of the report of the surveyor, the board may, if in their opinion the ship cannot proceed to sea without serious danger to human life, make such further order as they may think requisite as to the detention of the ship, or as to her release either absolutely or upon the performance of such conditions with respect to repairs, &c., as the board may impose:

Held, that neither the original information or complaint nor the report of the surveyor need state in terms that the vessel "cannot proceed to sea without serious danger to human life": it is enough if the facts reported to the board are such as ought reasonably to satisfy them that the condition of the ship is such that she is unfit to proceed to sea without serious danger to human life.

The chief officer of customs at Hull, on the 6th of November, 1873, intimated to the Board of Trade that he had examined a ship called the *Mary Ann* (built in 1831), and was of opinion that she should be examined with the cargo out but before being allowed to proceed to sea. The defendant (the assistant-secretary of the Board of Trade) on the 7th wrote to the collector of customs at Hull, as follows: "The Board of Trade having reason to believe that the vessel named above is unseaworthy, you are requested to detain her for the purpose of survey;" and on the same day he wrote to the owner of the *Mary Ann*, as follows,—"I am directed by the Board of Trade to inform you that they have reason to believe that the British ship *Mary Ann* is for the reasons stated unfit to proceed to sea without serious danger to human life. The Board of Trade have therefore ordered her detention by the proper authority until she can be surveyed."

The ship was surveyed on the 12th of November by two surveyors of customs, who reported to the board that "they had examined the vessel, and found that a thorough repair would be required to render her seaworthy, that the decks were quite worn out, the deck-beams and knees were defective, and the timbers rotten," and intimated that, as the vessel belonged to Sunderland, the owner wished to take her there for repair. This report was sent to the owner of the *Mary Ann* on the 15th of November, inclosed in a letter, in which the assistant-secretary of the board wrote, in answer to a request of the owner to be allowed to take the vessel to Sunderland in ballast,—"I am directed by the board to state that they are prepared to allow the *Mary Ann* to be towed round to Sunderland for the necessary repairs, 453] provided the crew, knowing the case, are willing to go *in her. Upon hearing that the repairs indicated in the accompanying report have been effectually and completely carried out, they will direct a re-survey of the vessel to be made," &c. On the 1st of January, 1874, the board communicated to the plaintiff's solicitors by telegram and letter their consent to the vessel *sailing* to Sunderland upon certain conditions. Those gentlemen in reply objected to the right of the board to make the conditions indicated, "inasmuch as your surveyors did not report that the ship was 'unfit to proceed to sea;' neither has the Board of Trade, so far as we know, made any order stating that in their opinion the ship is unfit to proceed to sea."

¹ In reply to this letter, the assistant-secretary of the board wrote to the solicitors on the 7th of January, 1874, a statement of the facts relating to the detention of the *Mary Ann*, concluding as follows,—“The Board of Trade now withdraw the modification of their order by which she would have been allowed to proceed to Sunderland; and, under the powers given to them by the act, they vary their order as follows, viz., that, as in their opinion the ship cannot proceed to sea without serious danger to human life, she shall be detained at Hull for further survey and repairs.”

The ship was accordingly surveyed on the 14th of January, the surveyors reporting that every portion of the hull was in a state of extreme decay; concluding their report as follows,—“From what we have seen and tested, we are of opinion that at the time of survey the ship was, having regard to the nature of the service for which she was intended, unfit to proceed to sea without serious danger to human life.” A copy of this report was sent to the plaintiff's solicitors on the 16th of January, in a letter in which the assistant-secretary wrote,—“I am to state that the order made by the board thereupon is, that the vessel be detained at Hull until repaired to the satisfaction of this board's surveyor.” Ultimately, the ship was taken possession of by a mortgagee, and sold for a small sum.

In an action brought by arrangement against the assistant-secretary of the Board of Trade for the alleged illegal detention of the ship:

Held, that the detention was justifiable, the board having ample grounds for believing that the ship could not proceed to sea without serious danger to human life; that the letter of the 7th of November, 1873, did not amount to an order under s. 12 of the act; but that the letter of the 7th of January, 1874, was a valid order which could be questioned only upon appeal under s. 14 of the act.

Sect. 14 of the act provides that, if the owner of any ship surveyed under this act is dissatisfied with any order of the board made upon such survey, he may apply (in England) to any court having Admiralty jurisdiction; and such court may order the ship to be surveyed anew, and may make such order as to the detention or release of the ship, and as to costs and damages, as to the court may seem just:

Quære, whether, in the case of any excess of jurisdiction on the part of the board, the plaintiff's common law remedy by action was taken away by this enactment?

THIS case, though depending upon statutory provisions, contains principles which may apply in this country. The head-notes are therefore given.

[1 Common Pleas Division, 471.]

Jan. 28, 1876.

***M'CORQUODALE and Another v. BELL and Another. [471]**

Inspection of Documents—Privileged Communications—Letters written with a View to anticipated Litigation.

The mere fact that letters are written to the plaintiff's solicitor “in confidence” and under a pledge not to disclose their contents to any one but the plaintiff and his legal advisers, affords no defence to an application for an order to inspect them. But, if they are not merely confidential communications, but are written in answer to inquiries by the plaintiff's solicitor with a view to and in contemplation of anticipated litigation, they are privileged.

Cossey v. London, Brighton and South Coast Ry. Co. (Law Rep., C. P., 146), and *Skinner v. Great Northern Ry. Co.* (10 Eng. Rep., 462,) followed. *Fenner v. London and South Eastern Ry. Co.* (Law Rep., 7 Q. B., 767), observed upon and explained.

THE plaintiffs carry on business in copartnership in London and elsewhere as printers and wholesale stationers, and

had for some years contracted to supply the Great Western Railway Company with printing and stationery required by them for the purposes of their establishments. In September, 1874, the plaintiffs delivered a tender to the company for the supply of printing and stationery, in pursuance 472] of public advertisements inviting *tenders for that purpose. The defendants also delivered a tender for the supply of such printing and stationery, and their tender was accepted by the company.

The plaintiffs having reason to believe that the tenders had been tampered with by the defendants and some persons in the employ of the company, brought an action against the defendants; and in their statement of claim they alleged that the defendants and two other persons therein mentioned unlawfully and maliciously confederated and agreed together to prevent the company from continuing to contract with the plaintiffs, and to induce them to contract with the defendants, and in pursuance of such confederacy and agreement they alleged that, after both the plaintiffs and the defendants had sent in tenders, the defendants and the other persons mentioned induced a servant of the company to allow the defendants to inspect the said tenders, and that the defendants in a certain room therein described, at the office of the company, improperly opened the tender of the plaintiffs, and inspected the prices therein set forth; that the defendants then altered some of the prices in their tender to prices lower than those in the plaintiffs' tender; and that by reason of what had so occurred the company were induced to enter into a contract with the defendants and to refuse to enter into a contract with the plaintiffs.

The defendants appeared separately and delivered separate statements of defence.

An order for discovery was obtained by the defendant Bell, in obedience to which the plaintiffs made the usual affidavit that they had in their possession or power the documents relating to the matters in question in this action set forth in the first and second parts of the schedule thereto, consisting chiefly of letters and copies of letters. The second paragraph of this affidavit was as follows :

We object to produce the documents in the second part of the said schedule, on the ground that such letters as were written and sent by ourselves or one of us, or by James Wighton, the manager of our business in Southwark, and David Davidson, the accountant in our business at Newton-

le-Willows, Lancashire, to Messrs. Baker & Nairne or Mr. Percival A. Nairne, were written to the said Messrs. Baker & Nairne or the said P. A. Nairne as solicitors for us or for one of us in this action or in the matters to which such letters refer, and that *such of the letters as are therein [473 mentioned as having been sent by Baker & Nairne to us or either of us were written and sent by Baker & Nairne as our solicitors, and that such of the said letters as are mentioned to have been written and sent by Mr. Nelson, the solicitor to the Great Western Railway Company, to our said solicitors, were written and sent by the said Mr. Nelson for the confidential and private information of our said solicitors, and were accordingly so marked by the said Mr. Nelson (as we are informed and believe) previously to their having been received by our said solicitors; and for the reasons aforesaid we object to produce the above mentioned documents mentioned and set forth in the second part of the said schedule.

Application was made, on behalf of the defendant Bell, to Archibald, J., at Chambers, for an order to inspect the documents in question; and the learned judge, without expressing any opinion, referred the matter to the court. Notice of motion having been given, the plaintiffs' attorney filed an affidavit in answer, the material parts of which were as follows:

4. In or about the month of February, 1875, I was consulted by the plaintiffs upon certain information which had reached them with regard to the manner in which they had been deprived of the contract and the defendants had obtained it. I was instructed to conduct, on behalf of the plaintiffs, certain inquiries to ascertain the truth or falseness of that information, and to enable the plaintiffs to commence such proceedings as they might be advised, if the information should turn out to be true.

5. The information which the plaintiffs had received with regard to their said tender was to the effect that, after their said tender had been delivered to the railway company and before it and the other tenders sent in by other persons had been considered and accepted or rejected, the defendants who had also delivered a similar tender to the company, and certain other persons acting in concert with them, had in an improper manner obtained access thereto for the purpose of comparing the prices set out in the plaintiffs' tender with those set forth in their own tender, and with the knowledge by that means obtained, and by altering the prices set out

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in the defendants' tender so as to make their prices lower than the prices set out in the plaintiffs' tender, the defendants obtained the said contract.

6. By the instructions of the plaintiffs, I called upon Mr. Nelson, the solicitor of the Great Western Railway Company, and informed him of the statements which had been made to the plaintiffs and to me as their solicitor. The statements implicated certain servants of the Great Western Railway Company as well as the defendants, who were then the company's contractors. I requested Mr. Nelson to make such an investigation of the circumstances as he might be able, and to let me know the result. This he agreed to do, on the stipulation that all communications from him to me would come from him to me as the solicitor of the plaintiffs, and would be for the confidential use of the plaintiffs and of myself on their behalf. He expressly stipulated that the information which he might give me should not be made public or communicated to any person other than the plaintiffs and their legal advisers. On this understanding the 474] letters referred *to in the defendant Bell's notice of motion in this action passed between the said Mr. Nelson and myself. Most of the said letters were marked "private," and all of them were written and received on the express understanding that their contents should not be made known to any one but the plaintiffs and their legal advisers.

7. My object and the object of the plaintiffs in making these communications to and inquiries from Mr. Nelson was, to ascertain the exact circumstances under which the defendants had succeeded in obtaining the contract of the Great Western Railway Company, with a view to the institution of proceedings against the defendants. This action is the result of those inquiries and communications and of the information thus obtained.

Jan. 28. *Francis* moved accordingly on behalf of the defendant Bell: The suggestion that the documents sought to be inspected are private and confidential communications, and that the writer objects to their production, affords no ground for declining to grant inspection: *Goodall v. Little* (*); *Richardson v. Hastings* (*); *Hopkinson v. Lord Burghley* (*).

[BRETT, J.: Letters written in answer to inquiries made with reference to litigation pending or anticipated, seem to be privileged: see *Woolley v. North London Railway*

(*) 1 Sim. N. S., 155; 20 L. J. (Ch.), 132.

(*) 7 Beav., 854; 13 L. J. (Ch.), 416.

(*) Law Rep., 2 Ch., 447.

Co. ('); *Cossey v. London, Brighton and South Coast Railway Co. (')*.]

In *Fenner v. London and South Eastern Ry. Co. (')*, which was decided since *Cossey v. London, Brighton and South Coast Ry. Co. (')*, Blackburn, J., lays down the rule thus: "The principle to be derived from all the cases is, that, where it appears that the documents are substantially rough notes for the case to be laid before the legal adviser, or to supply the proof to be inserted in the brief, the discretion of the court should, as a general rule, be to refuse the application. Where the documents fall short of that, it should as a general rule be granted."

[DENMAN, J.: The sixth and seventh paragraphs of the affidavit of the plaintiffs' solicitor brings this case expressly within *Cossey v. London, Brighton and South Coast Railway Co. (')*.

LINDLEY, J., referred to *Ross v. Gibbs (')*.]

In *Cossey v. London, Brighton and South Coast Ry. Co. (')*, the object of the application was to get at [475 the opponents' case. Here, it is to obtain the means of establishing our own case.

English Harrison, contra: In *Skinner v. Great Northern Ry. Co. (')* the Court of Exchequer declined to follow *Fenner v. London and South Eastern Ry. Co. (')*, and adopted the rule of this court in *Cossey v. London, Brighton and South Coast Ry. Co. (')* as being in accordance with the practice of their own court. In *Ross v. Gibbs (')*, Sir John Stuart, V.C., says: "Communications with a professional or even an unprofessional agent in anticipation of the litigation, and with a view to prosecution of a claim, or a defence against a claim, to the matter in dispute, being confidential, are privileged. Communications of plaintiffs and defendants with their own professional advisers as to their own rights or title to the subject-matter of the suit, though made before the suit, or before it was anticipated, are privileged." In *Simpson v. Brown (')*, the plaintiff had in her possession or power letters which had passed between her solicitor and a third person referring to the subject-matter in dispute, some of which had been written in anticipation of and the rest pending the proceedings in the suit; and it was held that she was not bound to produce them. The Master of the Rolls there says: "I think that in all cases in which a

(1) Law Rep., 4 C. P., 602.

(2) Law Rep., 5 C. P., 146.

(3) Law Rep., 7 Q. B., 767, 771.

(4) Law Rep., 8 Eq., 522.

(5) 9 Ex., 298.

(6) Law Rep., 7 Q. B., 767.

(7) Law Rep., 8 Eq., 522, 524.

(8) 33 Beav., 432.

solicitor writes letters for the purposes of the suit, and solely for the purpose of properly conducting it on behalf of his client, and obtains answers in reply, his client is not bound to produce them. He must necessarily, in the performance of his duties, make certain inquiries, and he is entitled to write to any person for that purpose, and is not bound, at the instance of the other side, to produce either his own letters or the answers to them." That is directly in point. In *Goodall v. Little* (¹), the letters were written by a stranger to the party. Here, the letters were written and the answers received for the very purpose of establishing the plaintiffs' case in a litigation which was about to commence.

BRETT, J.: This is an application on the part of the 476] defendant *Bell, not for discovery, but for the inspection of certain documents. The plaintiffs object to produce them, on the ground that they are communications between the plaintiffs or their solicitors and either the solicitor or the secretary of the Great Western Railway Company,—communications with a third party,—with a view to the institution of proceedings against the defendants, and that the present action is the result of those communications. I am of opinion that, in the exercise of the discretion of a judge at chambers and of the court, following the rule by which that discretion has usually been guided, no order for the production and inspection of these documents ought to be made. I do not think inspection ought to be refused on the ground that the documents in question were written privately and confidentially, even though the person writing them stipulates that they shall be considered as private and confidential, and refuses to authorize their production. I do not think that is any ground of privilege. Neither do I think they can be withheld on the ground that they are answers to inquiries made by the plaintiffs or their solicitors of a third person, and that they have reference to the subject-matter of the present litigation. But I think the plaintiffs ought not to be called upon to produce them, because they were questions asked and answers given with a view to anticipated litigation, and for the purpose of enabling the plaintiffs to carry on such litigation successfully. There is no case that I am aware of which contradicts that rule; it was so laid down by this court in *Cossey v. London, Brighton and South Coast Ry. Co.* (²), which was adopted by the Court of Exchequer in *Skinner v. Great Northern*

(¹) 1 Sim. N. S., 155; 20 L. J. (Ch.), 132.

(²) Law Rep., 5 C. P., 148.

Ry. Co. (1) The same rule seems to have been previously adopted in the Court of Chancery in *Ross v. Gibbs* (2). It is said that the case of *Fenner v. London and South Eastern Ry. Co.* (3) is at variance with those decisions. I should be sorry if I thought that was so; but, considering the way in which the point was taken in the argument and dealt with by the court there, I do not think that case is at all at variance with *Cossey v. London, Brighton and South Coast Ry. Co.* (4), or with *Skinner v. Great Northern Ry. Co.* (5). *The point which seems to me to have been really [477 decided in *Fenner v. London and South Eastern Ry. Co.* (6), is that stated by Blackburn, J., in his judgment. "I thought," he says (7), "that the documents specified in the schedule were obviously relevant to the question in dispute, and therefore fell within the general rule, and that the only question was whether they fell within any exception." Then he states what he was forced to decide there: "Mr. Willis," he says, "contended broadly that, as they were answers to questions put by the defendants after litigation was impending, they were necessarily privileged; and, if I had thought that there was any such general rule, I should have refused to make the order." Mr. Willis, therefore, for very good reasons, declined to argue the point now before us, viz., whether the communications were made with a view to anticipated litigation, or for the purpose of enabling the defendants to carry on or to guide them in the manner of carrying on the litigation. He practically argued that, even though not made with that object, they were entitled to privilege, because they were questions put after the commencement of litigation. The learned judge then goes on: "It occurred to me that there might be a distinction between the earlier documents and the later ones; for, I thought it almost certain from the materials before me that the first letter from the manager in town to the local officer would be something to this effect, 'We have a complaint as to the delay in delivering cattle at your station; report to us the circumstances;' and I thought the report sent in answer to such an inquiry would not be privileged." There he puts a case where no litigation is pending or anticipated, and he seems to think the answers in that case would not be privileged." There he puts a case where no litigation is pending or anticipated, and he seems to think the answers in that case would not be privileged. He goes on,—“But I

(1) Law Rep., 9 Ex., 298.

(4) Law Rep., 5 C. P., 146.

(2) Law Rep., 8 Eq., 522.

(6) Law Rep., 7 Q. B., at p. 769.

(3) Law Rep., 7 Q. B., 767.

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thought it also possible that some of the later letters might be something to this effect, 'It seems probable that, if we resist this claim, much will depend on the evidence of some particular person as to some particular fact, please to learn from him what his evidence will be, and communicate to us the result.'” There he puts the case of anticipated litigation, and of questions asked with a view to guide the party inquiring as to whether he shall resist the claim or not: and he says: “And, if such had been the fact, I should, 478] *in the exercise of the discretion which I think is vested in a judge, have refrained from ordering the inspection of the answer to that letter, without determining whether I had power to order it or not. Having this in my mind, I asked Mr. Willis whether he made any distinction between the documents. He made none; stating that he relied on a principle, which his clients thought of great importance, stated in the last paragraph of Noden's affidavit⁽¹⁾. Being of opinion that there was no such principle, I made the order to inspect all the documents except the report to the defendants' solicitors.” That seems to me to be no departure from the rule laid down by this court in *Cossey v. London, Brighton and South Coast Ry. Co.* ⁽²⁾. I find that the same learned judge, in a case of *Malden v. Great Northern Ry. Co.* ⁽³⁾, says: “If it appears that there is a letter from the attorney in a cause to a man who may very probably be called as a witness at the trial, that letter being written after the litigation had commenced (which is the case with all these letters), is it not *prima facie* a privileged communication, unless you show some reason to the contrary?” And Quain, J., says: “Confidential communications are not necessarily privileged; but, if they are made, not only as confidential communications, but with a view to or in contemplation of a litigation, they are privileged.” That is the doctrine upon which *Cossey v. London, Brighton and South Coast Ry. Co.* ⁽⁴⁾, and *Skinner v. Great Northern Ry. Co.* ⁽⁵⁾ are founded. In commencing his judgment in *Malden v. Great Northern Ry. Co.* ⁽⁶⁾, Blackburn, J., says: “We adhere to the principles laid down in *Fenner v. London and South Eastern Ry. Co.*” ⁽⁷⁾. As I understand that case, and the principles there laid down in answer to

(1) Which was as follows: “I object to produce or allow inspection of any of the foregoing documents, writings, or letters, on the ground that they were not written or made in the ordinary course of the duty of the person or persons writing or making them, but were made confidentially for the purpose of or with a view

to litigation and resisting the plaintiff's claim.”

(2) Law Rep., 5 C. P., 146.

(3) Law Rep., 9 Ex., 300.

(4) Law Rep., 9 Ex., 298.

(5) Law Rep., 9 Ex., at p. 301.

(6) Law Rep., 7 Q. B., 767.

the only argument which was urged on the part of the defendants, I also adhere to *Fenner v. London and South Eastern Ry. Co.* (*), inasmuch as I do not think that decision and those *principles are at all at variance with *Cossey* [479 v. *London, Brighton and South Coast Ry. Co.* (*), and *Skinner v. Great Northern Ry. Co.* (*)]. With respect to documents which are brought into being with a view to the conduct of litigation either already commenced or anticipated, I conceive the doctrine of all the courts to be of accord. I therefore think that, although the sixth paragraph of the affidavit of the plaintiffs' solicitor would not by itself have brought these documents within the rule of privilege I have above stated, yet, taking that and the seventh paragraph together, I think the case is brought within the rule, and therefore that no order for inspection should be made.

DENMAN, J.: I am of the same opinion. This is an application for the production and inspection of documents in the possession of the plaintiffs. The affidavit in opposition to the rule states two objections to the production of these documents,—first, that they are documents which passed confidentially between the solicitor of the Great Western Railway Company and the solicitors of the plaintiffs, and were received by the latter on the express understanding that they were to be considered as private and confidential communications. As regards that objection, however, the cases cited by Mr. Francis show it to be no ground for withholding inspection. But there is another objection which is clearly indicated in the affidavit produced before us to-day, which seems to me to afford an answer to the application, viz., that these were communications made with reference to and in contemplation of the litigation now in progress, and passing confidentially between the plaintiffs or their solicitors and the solicitor or secretary of the Great Western Railway Company, and that the letters passing between the parties were for the purpose of getting up the case of the plaintiffs. Now, there is no contradiction of that statement, and nothing so unnatural or improbable in it as to induce us to doubt the truth of it. It is just the sort of communication which would naturally take place between the plaintiffs' solicitors in getting up the case and the solicitor or other officer of the company, who were interested in the matter to be investigated. That being so, it appears to me that this case comes clearly within **Cossey v. London, Brighton and South Coast Ry.* [480 Co. (*), which was approved of and acted upon in *Skinner* (†) *Law Rep.*, 7 Q. B., 767. (‡) *Law Rep.*, 5 C. P., 146. (¶) *Law Rep.*, 9 Ex., 298.

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v. *Great Northern Ry. Co.* ⁽¹⁾. It is said that *Fenner v. London and South Eastern Ry. Co.* ⁽²⁾ is at variance with those decisions. But I see no difficulty in reconciling them. The utmost extent to which the case in the Queen's Bench goes is, that, though in certain cases there may be power in the court or a judge to order inspection of communications which have in a certain sense passed between the plaintiffs' solicitors and others in contemplation of anticipated litigation, yet that case does not touch the doctrine laid down in *Cossey v. London, Brighton and South Coast Ry. Co.* ⁽³⁾, that as a rule the courts will not allow inspection of this sort to be made unless a very strong affirmative case is made out for the exercise of their discretion. Upon that ground, *Fenner v. London and South Eastern Ry. Co.* ⁽³⁾ may be supported. But, even if I thought the rule laid down in this court and in the Exchequer to be too strict and rigid, still I should say that there is no ground here for holding that it would be a proper exercise of discretion to grant the inspection prayed.

LINDLEY, J.: I am of the same opinion. These documents are admitted to be documents which relate to the subject-matter of the suit; *prima facie*, therefore, the defendants are entitled to have inspection of them, and the plaintiffs are bound to show reasons why they should not be produced. Now, the first affidavit filed on the part of the plaintiffs assigns as the only reason for declining to produce them, "that they were written and sent by Nelson for the confidential and private information of our solicitors, and were accordingly so marked by Nelson." That is clearly not sufficient to protect them. That has been decided. But the second affidavit puts these documents in an entirely different position. The real state of things appears to be this,—The plaintiffs' solicitors set about obtaining information for the purpose of an impending litigation between them and the defendants; and in the course of so doing they apply to Mr. Nelson, the solicitor for the Great Western Railway Company, and to others, to see what evi-

481] dence *they could obtain. It is the same as if the solicitors had employed their own clerks to obtain the information, and had received letters from them detailing the results of their inquiries. I know of no principle upon which the inspection of documents so acquired could be allowed. I apprehend it to be well established both at law and in equity that documents obtained by a party or his solicitor with a view to and in contemplation of litigation,

⁽¹⁾ Law Rep., 9 Ex., 298. ⁽²⁾ Law Rep., 7 Q. B., 787. ⁽³⁾ Law Rep., 5 C. P., 146.

either pending or anticipated, are protected, even though received from persons unconnected with the litigation. Amongst the authorities which support that position are *Cossey v. London, Brighton and South Coast Ry. Co.* (*) and *Skinner v. Great Northern Ry. Co.* (*), and I know of none that is expressly opposed to it. *Fenner v. London and South Eastern Ry. Co.* (*) has been relied on as a decision the other way. But that case has been sufficiently distinguished by the remarks of my Brother Brett. There was nothing in it to show that the documents of which inspection was sought there were documents which had been obtained for the purpose of litigation either pending or anticipated. As to *Goodall v. Little* (*), that was a case in which two defendants had been writing letters to each other, and the plaintiff asked to see them. No ground for privilege was disclosed there. I must confess that this case appears to me to be a very plain one.

Rule refused.

Solicitors for plaintiffs: *Baker & Nairne.*

Solicitors for Bell: *Courtenay & Croome.*

(*) Law Rep., 5 C. P., 146.

(*) Law Rep., 7 Q. B., 767.

(*) Law Rep., 9 Ex., 298.

(*) 1 Sim. (N.S.), 155; 20 L. J. (Ch.), 132.

[1 Common Pleas Division, 482.]

Feb. 17, 1876.

[IN THE COURT OF APPEAL.]

*GOSLIN V. THE AGRICULTURAL HALL COMPANY [482
(LIMITED).]

Master and Servant—Sub-contractor—Conversion—Privity of Contract.

By agreement between the Smithfield Club and the defendants, who were proprietors of a building and premises at Islington called the Agricultural Hall, the club were to have the exclusive use of the hall during the period of their annual show of stock, &c., the defendants providing and paying a sufficient staff (who were to be under the sole control of the secretary and stewards of the club), to receive, take care of, and redeliver the stock, &c., exhibited, and also paying the club £1,000; in consideration of which the defendants were to receive certain fees or admission money from the visitors. The stock and articles to be exhibited were received at the gate of the defendants' premises by one Sharman (upon orders signed by the secretary of the Smithfield Club), who contracted with the defendants for a lump sum, amongst other things, to receive them and to redeliver them at the end of the show upon like orders; the defendants in no way interfering. One Stilgoe, who exhibited a pen of three sheep at the show in 1873, sold them to the plaintiff; and upon the plaintiff's drover producing an order for their removal signed by Stilgoe, Sharman or one of his men delivered him by mistake sheep from another pen. These the plaintiff rejected, and he brought this action against the defendants for converting his sheep:

Held, by Grove and Archibald, JJ.,—Lord Coleridge, C.J., doubting,—that the defendants were not responsible under the circumstances for the acts or defaults of Sharman or his men.

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Affirmed on appeal,—the Court of Appeal holding that, as between the plaintiff and the defendants, there was no privity of contract, and no duty on the part of the latter to redeliver the stock, &c., at the close of the show.

ACTION for the conversion by the defendants of three sheep belonging to the plaintiff. Pleas, not guilty and not possessed.

The cause was tried before Lord Coleridge, C.J., at the sittings in London after Michaelmas Term, 1874. The general outline of facts was as follows :

The Smithfield Club, a body of farmers and others interested in agriculture, had for some years in December held an exhibition of fat cattle, sheep and pigs, and also of implements of husbandry, roots, seeds, and other things connected with agriculture. In 1860 the club, being desirous of obtaining a more commodious place than they had theretofore had for their annual show, entered into an agreement with the defendants, a company registered pursuant to the Joint Stock Companies Acts, 1856 and 1857, and called 483] *The Agricultural Hall Company, Limited, for the use of their hall at Islington for that purpose for a term of twenty-one years. The material parts of this agreement, which was dated the 13th of December, 1860, were as follows :

It is hereby expressly agreed and declared that the said buildings and premises shall be placed at the entire and sole disposal of the trustees and stewards for the time being of the said club during the before-mentioned periods of time for the purposes aforesaid, and for the exhibition of all such animals and of all such implements of husbandry, seeds, roots, and other things appropriate and having reference to agriculture or husbandry, as the secretary for the time being of the said club shall certify and shall include in a list to be prepared by him, to be called a "Gate List," and to be furnished, if required, to the said Agricultural Hall Company on the respective days of admission. And it is hereby declared and agreed that the standing places of the respective persons so exhibiting shall be regulated by the secretary or the stewards for the time being of the said club or any one or more of them, and that the said Agricultural Hall Company shall at their own expense provide a sufficient number of good hurdles and of such form and dimensions as shall be required by such secretary or stewards as aforesaid, for penning the sheep and pigs, and shall provide and put up suitable posts, rails, and fastenings for the cattle, and shall also provide ready and fit for use all other requisite accommodation for the same, with a suffi-

cient quantity of placard boards whereon the particulars and description of the stock exhibited or proposed to be exhibited may be affixed. And the said Agricultural Hall Company at their own expense shall furnish and provide a sufficient number of able bodied men for unloading, loading, and arranging the implements, seeds, roots, and other articles and things, and in addition thereto shall pay six men, or more if certified by the secretary for the time being, to be necessary, who are to be selected by the secretary or stewards of the said club for the time being, to unload, load, and feed the animals in the yard, the same men respectively to be entirely under the direction of the secretary or stewards of the club for the time being; and shall also provide a sufficient quantity of hay and straw, with such a supply of good and proper water as may be requisite for all animals duly certified and placed by the secretary for the time being on the said list called the "Gate List," and for all such materials as shall arrive at the show yard on the said premises on and after the Friday next preceding the day of public exhibition in each of the several twenty-one years aforesaid; and that the said Agricultural Hall Company shall not nor will require or be entitled to receive any allowance or charge in respect of the hay, straw, or attendance to be provided by them; and, moreover, that they will, during the continuance of the respective exhibitions, procure and employ a sufficient number of duly qualified persons constantly during the nights to watch and guard the animals and other things therein exhibited or intended to be exhibited. Provided always and it is hereby expressly agreed that the said Agricultural Hall Company shall not be bound to procure such hay, straw, and attendance for any longer period than from the Friday next preceding until the Monday next following the first day of public exhibition in each of the said twenty-one years, such being the respective days in such years within which the animals to be exhibited are to arrive at and depart *from the said premises; and that for all [484 live stock that shall be entered on the said "Gate List," and also for all animals, whether included in such list or not, as shall arrive before or stay after the respective days above mentioned, the said Agricultural Hall Company shall be at liberty to make a reasonable charge to the exhibitors thereof; and that the said Agricultural Hall Company will, upon the first day of public exhibition in the year 1862 and in each of the next succeeding twenty years, pay into the hands of B. T. B. Gibbs, or other the secretary for the time

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being of the said club, or such other person or persons as the trustees for the time being of the said club shall authorize to receive the same, the sum of £1,000 sterling for the right and privilege of receiving for their own use and benefit the admission or gate-money of 1s. for each person entering to view the animals and things exhibited, which admission or gate-money of 1s. and no more for each such person it is hereby agreed the said Agricultural Hall Company shall be at liberty to charge on the four days of public exhibition which shall be appointed for the year 1862 and each of the then next succeeding twenty years, but so that it shall be lawful for the said Agricultural Hall Company with the consent of the said club, to be given at a general meeting, to vary the said rate of charge on any or either of the said days; and that no money shall be taken in the buildings and premises during these respective days for private exhibitions of any sort; and that the said Agricultural Hall Company will previous to and on the said days of exhibition freely admit the officers of the club, the exhibitors of animals and things and their respective servants in actual attendance, and also the members of the said club, and the reporters or representatives of the public press upon their producing a ticket authorizing their admission signed by the secretary for the time being of the said club, without taking any admission money from any of them; and that the said Agricultural Hall Company will not permit or suffer any public exhibition whatever to be made on any Sunday which may intervene between the days of the arrival and departure in the several years to which these presents are intended to apply, or any of the animals and things which on such intervening Sundays may on the said premises or any part thereof; and that no animal, article, or thing shall be removed from the said premises on any such intervening Sunday, except for the absolute necessity of such removal arising from illness or fire; and that the secretary or stewards for the time being of the said club shall have the entire and exclusive management and control of the business relating to the said exhibitions during the whole of the respective periods when the same shall be going on.

In furtherance of this agreement, the defendants contracted with one Sharman for putting up the necessary fittings for the exhibition and for the reception and redelivery of the cattle and implements; and men were employed under him for the general purposes of the show,

Sharman, who was called as a witness, on his examination in chief deposed in substance as follows: "The Agricultural Hall Company pay me. I went into their service some years ago: I remain so still. I am gate-keeper. I attend to delivery orders when they are brought to me. My duty is, to *point out the pens in which the sheep and pigs are [485 placed." On cross-examination he said: "I am a builder and contractor. I am also gate-keeper. I make four tenders every year,—one for receiving and delivering the implements, &c., one for sweeping and carting away the litter, one for putting up the fittings, and one for receiving and delivering the cattle, sheep, and pigs. In 1873 my tenders were accepted. I am paid a lump sum in respect of each tender. I send the tenders to the Hall Company. I take my instructions from the stewards of the Smithfield Club. The defendants do not interfere with me in the discharge of my duties. The owners of the animals admitted have to bring with them an admission order signed by the secretary of the club. I employ a number of men to carry into effect my various contracts. I pay them. The Agricultural Hall Company has no authority over me and my men."

The secretary of the Smithfield Club produced the printed regulations and conditions for the show, a copy of which, it was proved, was delivered to each exhibitor. Amongst these conditions were the following:

1. No charge will be made for hay and straw for any stock, by whomsoever exhibited, if the proper certificates have been lodged in time at the honorary secretary's office, except before Thursday the 4th and after dark on Saturday the 13th of December.

4. Every animal shown for a prize in a class, or a medal in extra stock, must have been in the possession of the exhibitor at least six months previous to the show, excepting pigs not exceeding nine months old, which can only be exhibited by the breeder.

40. The blank printed form of "delivery order" furnished by the secretary must be signed by the exhibitor or his agent, and must be given up at the yard by the person coming to take the stock away after the close of the show. The club will not in any case, or under any circumstances, hold itself responsible for any loss, damage, or misdelivery of live stock or any article exhibited at the club's show.

The Smithfield Club in 1873 held their annual show in the Agricultural Hall on Monday the 8th of December and four following days. At that show one Zachariah Stilgoe

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exhibited a pen of three sheep, in pen No. 261, in class 39. During the show, viz., on the 11th of December, the plaintiff, a butcher in London, became the purchaser of the sheep 486] for £19 10s., and on payment *of the price he received a delivery order, duly signed by the exhibitor, in a printed form provided by the club, as follows:

Delivery Order. To remove 3 sheep after the show.
No. 261.

To the gate-keeper of the yard.

Deliver to Mr. Goslin or bearer the pen of 3 sheep exhibited by me in class 39, in the Smithfield Club Show, 1873.

Z. S. STILGOE, Exhibitor.

Upon this order being presented at the gate of the show yard, a different pen of sheep from those he bought were by mistake delivered to the plaintiff's drover; those in pen No. 261 having been by mistake delivered out to another butcher. The plaintiff rejected them.

All the arrangements with intending exhibitors were made between them and the secretary or stewards of the Smithfield Club, the defendants never in any way interfering with them. There was no evidence to show how the misdelivery of the sheep in question took place; but it was assumed that it amounted to a conversion on the part of the defendants, provided they were responsible for the acts of Sharman.

His Lordship directed a verdict for the plaintiff for the sum claimed, reserving leave to move to enter a verdict for the defendants if the court should be of opinion that under the circumstances they were not liable for Sharman's acts.

Day, Q.C., in Hilary Term, 1875, obtained a rule *nisi*.

Jan. 13, 1876. *Prentice*, Q.C., and *Candy*, showed cause: They contended that, whether Sharman was the servant of the Agricultural Hall Company or a contractor only, the sheep in question having been received upon their premises with their consent, they were bound to redeliver them, and were responsible for the negligent acts of the persons employed by them to perform that duty,—relying upon the principle enunciated by Williams, J., in *Pickard v. Smith* (¹), and adopted by Blackburn, J., in delivering judgment in the House of Lords in *Mersey Docks Trustees v. Gibbs* (²),—“Unquestionably no one can be made liable for any act 487] *or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is

(¹) 10 C. B. (N.S.), 470, 480.

(²) Law Rep., 1 H. L., 93, 114.

employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. That rule, however, is inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned. If the performance of this duty be omitted, the fact of his having intrusted it to a person who also neglected it, furnishes no excuse either in good sense or law."

[The following authorities were also relied on: *Sadler v. Henlock* ('), *Gallagher v. Piper* ('), *Dalyell v. Tyrer* ('), *Murray v. Currie* ('), and the judgment of Parke, B., in *Quarman v. Burnett* (').]

Day, Q.C., Grantham and Wheeler, in support of the rule, contended that, Sharman being an independent contractor for (amongst other things) the performance of the services connected with the reception and redelivery of the stock, &c., on behalf of the Smithfield Club, the defendants were not responsible for his acts or omissions; that, even if Sharman were the servant of the defendants, yet, inasmuch as he was acting entirely under the orders and subject only to the control of the secretary and stewards of the Smithfield Club, the ordinary rules as to the liability of a master for the acts of his servants could not apply; that the exhibition was the exhibition of the Smithfield Club, and not of the defendants; and that all the dealings and all the documents relating to the show were conducted with and emanated from the secretary of the club, the defendants merely letting their premises and their servants and workmen to the club for the purpose of carrying out the contract which they had entered into with the club.

[They cited the following authorities: *Reedie v. London and *North Western Ry. Co.* ('), *Knight v. Fox* ('), [488 *Milligan v. Wedge* ('), *Overton v. Freeman* ('), *Murphy v. Caralli* ('), *McCawley v. Furness Ry. Co.* ('), and *Hall v. North Eastern Ry. Co.* (').]

(1) 4 E. & B., 570; 24 L. J. (Q.B.), 138.

(2) 16 C. B. (N.S.), 669; 33 L. J. (C.P.), 329.

(3) 8 E. B. & E., 899; 28 L. J. (Q.B.), 52.

(4) Law Rep., 6 C. P., 24.

(5) 6 M. & W., 499.

(6) 4 Ex., 244; 20 L. J. (Ex.), 65.

(7) 5 Ex., 721; 20 L. J. (Ex.), 9.

(8) 12 A. & E., 737; 10 L. J. (Q.B.), 19.

(9) 11 C. B., 867; 21 L. J. (C.P.), 52.

(10) 3 H. & C., 462; 34 L. J. (Ex.), 14.

(11) Law Rep., 8 Q. B., 57.

(12) Law Rep., 10 Q. B., 437.

GROVE, J.: I am of opinion that this rule should be made absolute. The case was that of a person who had an order from an exhibitor to receive certain sheep which had been exhibited in a building called the Agricultural Hall, which was fitted up suitably for the reception of animals at an annual show, but which does not appear to have been confined exclusively to that purpose, but to have been used at other times for any purposes to which the proprietors chose to devote it. The show in question was the annual show of the Smithfield Club, who were paid by the proprietors of the Agricultural Hall £1,000 for such exhibition. The agreement under which the hall was so used, as I construe it, bound the proprietors to provide certain servants (six of whom were to be selected by the Smithfield Club) to manage the show. A man named Sharman acted as the chief amongst these officials; and the case turns mainly, if not entirely, in my opinion, upon the evidence given by that person, and upon certain documents which were put in at the trial. Now, Sharman's evidence was to this effect,—“The Agricultural Hall Company pay me. I went into their service some years ago. I remain so still. I am gate-keeper. I attend to delivery orders when they are brought to me. My duty is, to point out the pens in which the sheep and pigs are placed.” He is there describing his duties during the time of the show. Upon his cross-examination, Sharman says: “I am a builder and contractor. I am also gate-keeper. I make four tenders every year,—one for receiving and delivering the implements, one for sweeping and carting away the litter, one for putting up the fittings, and one for receiving and delivering the cattle. In 1873 my tenders were accepted. I am paid a lump sum in respect of each tender. I send the tenders to the Hall Company. I am paid by the Hall Company. I take my instructions 489] *from the stewards of the Smithfield Club. The defendants do not interfere with me in the discharge of my duties. The owners of the animals admitted have to bring with them an admission order signed by the secretary of the club. I employ a number of men to carry into effect my various contracts. I pay them. The Agricultural Hall Company has no authority over me and my men. I cannot say one way or the other whether I did or did not point out these sheep.” Now, one question which arises upon that evidence, and upon which a good deal of the argument has turned, and which no doubt is an arguable question, is, whether Sharman, with reference to the Agri-

cultural Hall Company, the defendants in this action, was in the position of a servant or in that of a contractor. With reference to the opinion which I have formed, and upon which I ground my judgment, that question becomes immaterial. All the duties performed by Sharman with reference to the cattle show were duties to be performed by him under the orders of the stewards of the Smithfield Club. The evidence of Sharman as to this is distinct. This view is supported by the clause in the agreement by which it is provided that "the said Agricultural Hall Company, at their own expense, shall furnish and provide a sufficient number of able bodied men for unloading, loading and arranging the implements, seeds, roots and other articles and things, and in addition thereto shall pay six men, or more if certified by the secretary for the time being to be necessary, who are to be selected by the secretary or stewards of the said club for the time being, to unload, load and feed the animals in the yard, the same men respectively to be entirely under the direction of the secretary or stewards of the club for the time being." Looking at the documents in the case, I find that the whole of the dealings with the exhibitors are with the Smithfield Club, and not with the Agricultural Hall Company. And I think Mr. Wheeler, in his very able argument, did not go too far when he said that, so far as the exhibitors and those persons to whom they might sell their property were concerned, the Agricultural Hall Company are strangers. The admission order, which is signed by the secretary of the Smithfield Club, is addressed "To the gate-keeper of the show at the Agricultural Hall, Islington." The hall and the services of the attendants seem to *have been entirely given up to the Smithfield Club, [490 who had the sole and entire control of the show, and who issued the delivery orders for restoring the animals or articles exhibited after the show. The 40th rule of the Smithfield Club, upon which both sides have placed reliance, seems to me to be important as showing that the whole management of the show was in the hands of the Smithfield Club. It provides that "the blank printed form of delivery order furnished by the secretary must be signed by the exhibitor or his agent, and must be given up at the yard by the person coming to take the stock away after the close of the show." It then goes on, "The club will not in any case or under any circumstances hold itself responsible for any loss, damage, or misdelivery of live stock or any article exhibited at the club's show." All the dealings of the exhibitors are with the stewards of

the Smithfield Club ; they know nothing of the Agricultural Hall Company, except that the Agricultural Hall is the name of the building in which the club holds its annual show. And, assuming that Sharman may, at other times and for other purposes have been the servant of the Agricultural Hall Company, all the evidence and the documents show that for this purpose he was acting as the servant of the Smithfield Club, to whom his services were for the time transferred. I think the case falls within the principle of those in which an employer is held not to be responsible for the acts of his servant when not acting within the scope of his employment. It may be that in this case the Smithfield Club have by their conditions exempted themselves from liability ; but that will not enable the plaintiff to saddle the Agricultural Hall Company with the loss. For these reasons, I think this rule must be made absolute.

ARCHIBALD, J.: I am of the same opinion. It is sought to make the defendants liable in this case for the default of Sharman, upon the ground that he was the servant of the defendants and committed this default in the course of his employment as their servant. The principles which govern the liability of employers for the acts of their servants have been very fully discussed : but I do not think it necessary to advert to them, because I am prepared to agree in the 491] view taken by my Brother Grove. The *argument on the part of the plaintiff must proceed upon the assumption that the sheep in question were in the custody of the Agricultural Hall Company, or rather in the custody of Sharman as the servant of the Agricultural Hall Company. But, when we consider the arrangement between that company and the Smithfield Club, I think it is clear that, so far as regards the arrangements for the cattle show, Sharman was so entirely placed at the disposal of the Smithfield Club that whatever he did with reference to that was done by him, not as the servant of the Agricultural Hall Company, but as the servant of the Smithfield Club. The arrangement was a peculiar one. It was, that the Agricultural Hall Company should provide a suitable building for the Smithfield Club to hold its annual show in, and should for a term of twenty-one years pay the club £1,000 a year for the privilege of holding the show therein for fourteen days in each year, the company providing the requisite fittings and conveniences, and also providing a staff of servants who were to be under the entire control of the Smithfield Club. The parties who brought animals or other things for exhibition made all their arrangements with the Smithfield

Club and not with the Agricultural Hall Company. The question to my mind turns upon this,—Was there any privity between the plaintiff and the Agricultural Hall Company? The documents all show that the arrangements made with the exhibitors were all made with the Smithfield Club, and not with the Agricultural Hall Company. The first document, which is the ticket for the admission of animals to the show, is signed by the secretary of the Smithfield Club. It sets out some of the conditions upon which the animals are to be received: and the evidence was that a copy of those rules was delivered to each exhibitor, and that the animals received at the hall were received under the conditions and terms embodied in those rules. I will just call attention to one or two of those rules. The first is, that “No charge will be made for hay or straw for any stock, by whomsoever exhibited;” and the fourth, “Every animal shown for a prize in a class or a medal in extra stock must have been in the possession of the exhibitor at least six months previous to the show, excepting pigs not exceeding nine months old, which can only be exhibited by the breeder.” Amongst these rules there *is one,—the [492 40th,—which was inserted for the purpose of freeing the Smithfield Club from liability for “loss, damage, or mis-delivery.” I agree with my Brother Grove that the first part of that rule is of extreme importance. “The blank printed form of ‘delivery order’ furnished by the secretary,” that is, the secretary of the Smithfield Club, “must be signed by the exhibitor or his agent, and must be given up at the yard by the person coming to take the stock away after the close of the show.” These sheep, then, were received by the Smithfield Club upon an understanding that they shall not be redelivered to the exhibitor except upon certain conditions, viz., upon giving up the delivery order (signed) to the person in charge of the yard. The case is not as if the sheep had been in the custody of the Agricultural Hall Company or of Sharman as their agent without any condition as to the redelivery. In that case, if there had been a demand made upon them or upon Sharman for the possession of them, a refusal to deliver them would have been evidence of a conversion. But the whole of the documents show that the sheep were delivered to the Smithfield Club, and that they are only to be redelivered in accordance with rule 40, and that the person who redelivers them is acting under the orders of the Smithfield Club. It is impossible to say that Sharman was acting in this respect as the servant of the Agricultural Hall Company. I quite agree that,

if it was shown that there was any agreement on the part of the Agricultural Hall Company to re-deliver the sheep (which would necessarily involve an admission that they had the custody of them), and a refusal so to do, it would have been perfectly immaterial to consider whether Sharman was their servant or not, or whether he was a mere contractor; for, in that case, it is clear, upon the authorities, that the Agricultural Hall Company would be liable for his default: *Mersey Docks Company v. Gibbs* (*). But that presupposes the existence of a duty on the part of the defendants towards the plaintiff: and it seems to me that these documents negative the existence of such a state of things. The contract is between the plaintiff and the Smithfield Club; and the duty is imposed upon the latter, who would clearly be liable for a breach committed by the person who acted 493] for them, if they had *not by the latter part of the same rule protected themselves from responsibility "for any loss, damage, or misdelivery of live stock or any article exhibited at the club's show." That being so, I see no ground upon which the present defendants can be held liable for any default of Sharman. In my judgment, he was not in any way acting in the matter as their servant. For these reasons, I agree with my Brother Grove that the rule to enter a nonsuit should be made absolute.

LORD COLERIDGE, C.J.: This case was tried before me, and the jury found a verdict for the plaintiff for £19 10s. It appeared on the discussion which took place at the trial that the plaintiff might have had his sheep back on the same evening or at the latest the day after the occurrence of the mistake, and that little (if any) damage would have been sustained, but for his own loss of temper. Although, therefore, I am not without some doubt, I have not thought it worth while to take time to consider in order to ascertain whether upon reflection this doubt would be strengthened into difference of opinion with my two learned Brothers. The grounds of my doubt are, not that I in the slightest degree question the principles of law which are applicable to this case, but merely as to how far the facts bring it within those well recognized principles. There are two parties here who appear to be interested in different degrees in this agricultural show,—the Agricultural Hall Company (the defendants), and the Smithfield Club. The show takes place in the building and premises of the defendants. There is no demise of the building to the Smithfield Club; but the Smithfield Club have the conduct and management of the

(*) Law Rep., 1 H. L., 114.

show. All the documentary dealings in relation to it are between the exhibitors and the Smithfield Club; and the defendants are to be made liable in this case, if liable at all, in consequence of the act or omission of Sharman. The whole question is whether there was any duty on the part of the defendants to redeliver these sheep to the plaintiff. If there was any such duty, they have not fulfilled it; for there clearly has been a conversion. I apprehend the law on this subject has been laid down in the clearest and best possible terms, partly in quotation and partly in original dictum, by Blackburn, J., in the *opinion which he [494 delivered in the House of Lords in the case of *Mersey Docks Trustees v. Gibbs* (¹), to which reference was made in the course of the argument. The passage from the judgment of Williams, J., in *Pickard v. Smith* (²), has been read more than once, and I will not read it again. But the whole matter is summed up by Blackburn, J., to this effect: "Liability," he says (³), "for doing an improper act depends upon the order given to do that thing; and the liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done." I observe parenthetically that the last of those two cases is the case here. "And in the last two cases, it is quite immaterial whether the actual actors are servants or not." Now, in this case, the duty of receiving and redelivering the stock, as between the Smithfield Club and the defendants, was clearly a duty assumed by the defendants. According to Sharman's evidence, he had entered into amongst others a contract with the defendants to receive and to redeliver the stock and other things exhibited. That, however, I quite admit does not dispose of the matter; because, although as between themselves and the Smithfield Club, and as between themselves and Sharman, the defendants could not deny that it was their duty to receive and to redeliver, it may well be,—and my learned Brothers have come to that conclusion,—that, upon the facts proved and admitted, there was no contract as between the plaintiff and the defendants which raises a duty in the latter to redeliver. Now, I quite admit that upon the documents no such contract exists at all so far as the defendants are concerned. They prove only a contract between the plaintiff and the Smithfield Club. The way in which it struck my mind in the course of the argument, and the way in which I am not convinced that it may not be properly put, is this, that the true view of the case is that the Smithfield Club conduct the

(¹) Law Rep., 1 H. L., 114. (²) 10 C. B. (N.S.), 480. (³) Law Rep., 1 H. L., 115.

show, but that they conduct it on the premises of third persons, viz., the defendants, and that they contract as between themselves and the exhibitors that the stock and implements shall be exhibited on the defendants' premises according* to certain conditions which are to bind them; and further they contract, in the event of what has happened here, viz., a misdelivery of stock exhibited, that the Smithfield Club shall be in no way answerable to the plaintiff. My mind is, however, by no means free from doubt whether from the receipt of the animals by the defendants upon their premises through the hands of a man, be he contractor or be he servant, employed and paid by them to receive and to redeliver, there is not an implied contract between them and the exhibitors for the breach of which they may be liable. My impression is not sufficiently strong to induce me to differ from the rest of the court, and therefore I concur, though with some hesitation, that the rule to enter a verdict for the defendants should be made absolute.

Rule absolute.

Feb. 17. The plaintiffs appealed against this decision, and the appeal was argued by *Herschell*, Q.C., and *Candy*, for the appellants: *Day*, Q.C., *Grantham*, and *Wheeler*, for the respondents, not being called upon.

THE COURT (James and Mellish, L.JJ., Baggallay, J.A., Mellor, J., and Cleasby, B.) affirmed the decision of the court below, being of opinion that there was no privity of contract between the plaintiff and the defendants as to the receipt and redelivery of the stock, and no duty for the breach of which they could be held responsible.

Judgment affirmed.

Solicitors for plaintiff: *Angell & Imbert-Terry*.

Solicitors for defendants: *Kingsford, Dormer & Kingsford*.

A person or corporation is not ordinarily liable for the acts or the negligence of a contractor or his servants: 9 Eng. Rep., 223-5 note.

See note to *Richardson v. Great Eastern*, etc., *ante*, p. 299.

Canada, Upper: *Woodhill v. Great Western*, etc., 4 C. Pl., 449; *Browne v. Brockville*, etc., 20 Q. B., 202; *Johnston v. Hastie*, 30 Q. B., 232.

See *Torpy v. Grand Trunk*, etc., 20 U. C. Q. B., 446.

Connecticut: *Lawrence v. Shipman*, 39 Conn., 586.

Kentucky: *Robinson v. Webb*, 11 Bush, 464.

New Hampshire: *Wright v. Holbrook*, 52 N. H., 120, overruling *Bush v. Steinman*, 1 Bos. & Pull., 404, and questioning *Stone v. Cheshire*, etc., 19 N. H., 427.

New York: *Earl v. Beadleston*, 42 N. Y. Superior Court Rep., 294; *King v. New York Cent.*, etc., 66 N. Y., 181; *McCafferty v. Spuyten Duyvil*, etc., 61 N. Y., 178, 48 How. Pr., 44; *Blake v. Ferris*, 5 N. Y., 48; *Gardner v. Bennett*, 38 N. Y. Superior Court Rep., 197; *Gilbert v. Beach*, 5 Bosw., 445, 16 N. Y., 608; *Potter v. Seymour*, 4 Bosw., 140; *Clare v. National*, etc., 14 Abb. Pr., N.S., 326.

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Pennsylvania: *Wray v. Evans*, 80 Penn. St. R., 102; *Reid v. Allegheny City*, 79 Penn. St. R., 300.

Wisconsin: *Hundhausen v. Bond*, 36 Wisc., 29.

Where, however, the injury necessarily results directly and proximately from the acts which the contractor has agreed to perform is authorized by his employer to do, or is occasioned by the omission of some duty incumbent on him, or is an act which the employer has no lawful right to perform, and not from negligence or carelessness in the manner of performance by the contractor, the employer is also liable to the injured party, and an action will lie against the employer and contractor jointly: *Earl v. Beadleston*, 42 N. Y. Superior Court Rep., 394; *King v. New York Cent.*, etc., 66 N. Y., 181; *McCafferty v.*

Spuyten Duyvil, etc., 61 N. Y., 179; *Creed v. Hartman*, 29 N. Y., 591, 8 Bosw., 123; *Irvin v. Wood*, 4 Rob., 138, 143, 51 N. Y., 224; *Robinson v. Webb*, 11 Bush (Ky.), 464; *Hundhausen v. Bond*, 36 Wisc., 29.

Any interference, assumption of control, or directions given by the owner, of buildings, erected for him by contractors under a special agreement giving the latter the control of the work, renders him personally liable for injuries caused to third persons by the negligent conduct of such contractors, in work done in obedience to such directions: *Hefferman v. Benkard*, 1 Rob., 432.

See however *Gardner v. Bennett*, 88 N. Y. Superior Court Rep., 197; *Kelly v. Mayor*, 11 N. Y., 432; *Blake v. Ferris*, 5 N. Y., 48.

[1 Common Pleas Division, 496.]

Feb. 18, 1876.

***NEWELL V. THE NATIONAL PROVINCIAL BANK OF [496 ENGLAND.**

Administration Suit—Order for taking an Account of Debts and Liabilities affecting the personal Estate of Intestate, under 23 & 24 Vict. c. 38, s. 14—Set-off—Counter-claim—Judicature Act, 1875, Order XIX, Rule 3.

To an action by an administrator for the balance of the intestate's banking account at the time of his death, the defendants in their statement of defence sought to avail themselves, either by way of set-off or of counter claim, of a debt due to them from the intestate as one of several makers of a promissory note for £1,000, which did not become due until after the intestate's death. Reply, that, before action, an order was made in an administration suit in the Chancery Division, to take an account of the debts and liabilities affecting the personal estate of the deceased, of which the defendants before action had notice; and that, under s. 14 of 23 & 24 Vict. c. 38, equity would restrain any proceedings on the note until the account had been taken. On demurrer to this reply:

Held,—upon the authority of *Rees v. Watts* (11 Ex. 410), that the claim in respect of the promissory note could not be relied on as a set-off; and that, in accordance with the practice in equity, the defendants must under the circumstances be restrained from setting it up by way of counter claim, and be left to prove for it in the administration suit.

STATEMENT of claim, 23d November, 1875.

1. Frederick Palmer Martindale (hereinafter called the deceased) died on the 9th of August last, and on the 20th of September following letters of administration were duly granted to the plaintiff, who was a creditor of the deceased.

2. The defendants are bankers, and had in their possession at the date of the death of the deceased a balance due to him of £80 7s. 3d.

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3. On or about the 27th of September, the plaintiff, as administrator of the deceased, demanded payment of this balance, which was refused.

The plaintiff, as administrator of the deceased, claims, 1. £80 7s. 3d., together with interest thereon from the date of application for payment up to execution; 2. such further or other relief as the nature of the case may require.

Statement of defence and counter claim, 30th November, 1875.

1. On the 21st of April, 1875, the deceased and certain other persons made their joint and several promissory note, whereby they jointly and severally promised to pay to the 497] defendants or *their order the sum of £1,000 four months after date, for value received.

2. The note became due on the 24th of August, 1875; but neither the deceased, or the plaintiff on behalf of the deceased, nor any of the said other makers of the note have paid the same, and the said note remains still due and unpaid.

3. The defendants claim from the plaintiff, as administrator of the deceased as aforesaid, the amount of the said note and interest thereon to judgment, and such further and other relief as the nature of the case may require.

Reply, 21st December, 1875.

1. The plaintiff relies by way of defence to the defendants' counter claim, as a matter of equity, that the promissory note mentioned in the defendants' counter claim was made by the deceased jointly and severally with certain other persons as a collateral security for the repayment of money lent by the defendants to the Equitable Permanent Land, Building, and Investment Society, and did not become due till after the death of deceased.

2. On the 2d of November, 1875, an order was made in the Chancery Division to take an account of the debts and liabilities affecting the personal estate of the deceased, and before action notice was given to the defendants that their claim, if any, would be adjudicated upon in due course.

3. Under the provisions of 23 & 24 Vict. c. 38, any proceedings at law in respect of the said promissory note might and would have been restrained until the account directed by the above order had been taken, which has not yet taken place.

Demurrer, 4th January, 1876.

The defendants demur to the plaintiff's reply, on the ground that the plaintiff does not show that the defendants have not a right to retain in their hands the balance due to the deceased and now sought to be recovered from the de-

fendants by the plaintiff in his statement of claim, and upon other grounds sufficient in law to sustain this demurrer.

Mansel Jones, in support of the demurrer: The plaintiff can be in no better position than the intestate was in at the time of *his death. At that time the bank owed the [498] intestate £80 7s. 3d., and they had a claim against him on a promissory note (which was not then due) for £1,000. The plea is good by way of set-off, and the replication is no answer to it. There is no allegation that the note has been paid by the other parties to it; therefore *prima facie* the money is due from the deceased. Set-off has the same effect as a counter claim: Order XIX, Rule 3.

[BRETT, J.: Can there be any doubt that a court of equity would under 23 & 24 Vict. c. 38, s. 14 (*), have restrained the defendants, if, instead of a set-off or counter claim, this had been an original action?]

No doubt a court of equity would have restrained a proceeding at law pending the administration suit, upon a proper application. Still it is competent to this court, under s. 24, subs. 7, of the Judicature Act of 1853, to do complete justice between the parties. This is a claim in respect of which the defendants would have had a clear right of set-off in bankruptcy: *Alsager v. Currie* (*).

Prideaux, Q.C. (*Castle* with him), contra: *Alsager v. Currie* (*) was a case of mutual credit under the Bankrupt Act, 6 Geo. 4, *c. 16, s. 50. The plaintiff's claim here [499] is for a debt due from the defendants to the intestate in his lifetime: the defendants' counter claim is in respect of a

(*) 23 & 24 Vict. c. 38, s. 14: "The order to take an account of the debts and liabilities affecting the personal estate of a deceased person pursuant to s. 19 of 13 & 14 Vict. c. 35, may be made immediately or at any time after probate or letters of administration shall have been granted; and such order may be made either by the Court of Chancery upon motion or petition of course, or by a judge of the said court sitting at chambers, upon a summons in the form used for originating proceedings at chambers; and, after any such order shall have been made, the said court or judge may, on the application of the executors or administrators, by motion or summons, restrain or suspend, until the account directed by such order shall have been taken, any proceedings at law against such executors or administrators by any person having or claiming to have any demand upon the

estate of the deceased, by reason of any debt or liability due from the estate of the deceased, upon such notice and terms and conditions (if any) as to the said court or judge shall seem just; and the judge, in taking an account of debts and liabilities pursuant to any such order, shall, on the application of the executors or administrators, be at liberty to direct that the particulars only of any claim or claims which may be brought in pursuance of any such order shall be certified by his chief clerk without any adjudication thereon; and any notice for creditors to come in which may be published in pursuance of any such order shall have the same force and effect as if such notices had been given by the executors or administrators in pursuance of the 29th section of the 22 & 23 Vict. c. 35."

(2) 12 M. & W., 751.

promissory note signed by the intestate* as surety, and which was not due until after his death. That could not be made the subject of a set-off. In *Beckwith v. Bullen* (¹), it was held that there is no right either at law or in equity to deduct a loss on a policy underwritten by a testator with a broker, from the amount due to the executors for premiums from the same broker, though the circumstances are such as in case of bankruptcy would support a plea of mutual credit. So, in *Rees v. Watts* (²) it was held by the Exchequer Chamber that, to an action by an administrator who sues in his representative character for a debt due after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his lifetime. Sir John Coleridge, in delivering the judgment of the court, there says (³): "The words of the statute (⁴) upon which the question in the cause depends are these,—'Where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other.' The expressions are not very happily chosen, but the meaning seems to us very clear. The case of mutual debts was to be provided for, and the necessity for cross actions in such cases put an end to. In the first branch of the sentence, the simplest case is mentioned,—that of mutual debts between two living persons,—that is, of debts existing between them, contracted respectively in their individual character. In the second, the case supposed is that of one of these mutual debtors dying and being represented by an executor or administrator, in which case such representative will stand, in relation to the survivor, if suing or being sued, exactly in the same situation as his testator or intestate would have stood in, and the same right of set-off is given. In this latter case it is quite as necessary as in the former that the debts should originally have existed between the two living parties. The executor or administrator 500] to come within the statute must sue or be sued *necessarily in his representative character: if not, although he may be called executor, he is really a third party introduced (whereas it is essential that there should be only two concerned), and the mutuality of the debts, without which there can be no set-off, does not exist." The debt sought to be set off here never was a debt due from the intestate.

(¹) 8 E. & B., 683; 27 L. J. (Q.B.), 162.

(²) 11 Ex., at p. 414.

(³) 2 Geo. 2, c. 22, s. 13.

(⁴) 11 Ex., 410; 25 L. J. (Ex.), 30.

equity requires mutuality of parties, as well as law. Lord Selborne, in delivering judgment in the Court of Appeal in *Re Paraguassu Steam Tramway Co., Black & Co.'s Case* (1) says: "What is the ordinary law of set-off? It is what in the civil law was called compensation, and simply means this,—that, when you have got two cross demands of a nature substantially the same, and due to and from A. and B. in the same right, that is to say, when the one is a creditor in his own right and debtor also in his own right to the other, the one debt may be set off against the other at the option of the party from whom payment is demanded. But it is essential in such cases that the rights should be substantially the same. If they were apparently the same at law, but different in equity, set-off would not be allowed here; nor do I suppose that, in the present state of the law (2), it would be allowed at common law either."

Then, if the defendants are only entitled to avail themselves of this defence by way of counter claim, which is equivalent to a cross action, a court of equity would clearly have restrained the defendants before the passing of the Judicature Acts: *Re Cole's Estate* (3); *Middleton v. Pollock* (4): and this court will now, under Order XIX, Rule 3, do the same (5).

Cur. adv. vult.

Feb. 18. BRETT, J.: In this case, which was argued before us *yesterday, the facts as admitted by the de- [501] murrer are, that the plaintiff as administrator of F. P. Martindale, deceased, is entitled to demand from the defendants, his bankers, £80 7s. 3d., being the balance of his account in their hands at the time of his decease; but that the defendants have a claim against the estate of the deceased for £1,000, the amount of a promissory note given to them by the deceased. That promissory note, which was made in the lifetime of the intestate, did not become due until after his decease; therefore the defendants could not have claimed the amount from him in his lifetime. That being the state of things on the claim and counter claim or set-off, the replication shows that, after the death of the in-

(1) Law Rep., 8 Ch., 254, 261.

(2) At the close of 1872.

(3) 17 L. T., 494.

(4) Law Rep., 20 Eq., 515.

(5) Reference was made to a dictum of Sir James Mansfield, in *Brady v. Sheil* (1 Camp. 148), to this effect,—“He wished it were more generally known (for he believed that lawyers in the court of King's

Bench were not aware of it) that through the medium of a court of equity, the creditors of deceased insolvent may always be compelled to take an equal distribution of the assets. It was only necessary for a friendly bill to be filed against the executor or administrator, to account; after which, the Chancellor would enjoin any of the creditors from proceeding at law.”

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testate, an order was made in the Chancery Division of the High Court to take an account of the debts and liabilities affecting the personal estate of the deceased, and that notice was given to the defendants that their claim, if any, would be adjudicated upon in due course; and that, according to the practice of that Division under 23 & 24 Vict. c. 38, any proceedings at law in respect of the promissory note would be restrained until the account directed by the order had been taken. To this replication there is a demurrer; and it was argued on behalf of the plaintiff that he is entitled to judgment for the £80 7s. 3d., and that the defendants cannot set up any counter claim in respect of the promissory note. The first point taken was, that this statement of defence could not be relied on as a set-off, because not specifically stated to be so claimed; and Order XIX, Rule 10, of the Judicature Act, 1875, was relied on. But it seems to me that there is no ground for the objection. I take the decisions to amount to this, that a statement of defence may set out facts to show that the plaintiff never had any claim, or that, if the claim of the plaintiff be good, the defendant can by payment, set-off, or counter claim, equal or overtop the plaintiff's claim. Upon this demurrer, therefore, we must consider the case first as if we were sitting as a court of law under the old system, and next as if we were a court of equity, and see if there is any and what difference. Now, there is no doubt the plaintiff's claim is a good one, and therefore *prima facie* the plaintiff would be entitled to the £80 7s. 3d.; and at law the first question would be whether the defendants' claim would be a good subject of set-off. 502] The case *of *Rees v. Watts* (1) seems to be a distinct authority to show that it could not be relied on as a set-off. It is not brought within the terms of the Statute of Set-off. The plaintiff's claim is a claim by the administrator of a deceased person for a debt due to the intestate in his lifetime. The claim which is set up in opposition to that is in respect of a debt which accrued due from the estate after the death of the intestate. The words of the Statute of Set-off, as interpreted by that case, show that the defendants' claim is one which could not be set off, and therefore at common law the plaintiff would have been entitled to judgment for the £80 7s. 3d., without any deduction, and the defendants would have been driven to a cross action. The question now is, what is the state of things under the new system of procedure under the Judicature Acts? It follows from what I have said that at common law the defendants'

(1) 11 Ex., 410; 25 L. J. (Ex.), 30.

claim would have been a matter not of set-off but of counter claim. In equity this exact state of things never could have existed. The question would have been raised either in an administration suit or under such an order as is mentioned in the replication. The course of proceeding would have been this. The defendants would have been called upon to pay a debt of £80 7s. 3d. due to the estate of the intestate. If they disputed their liability, the court of equity would have directed the administrator to bring an action at law; and the plaintiff would have recovered judgment and had execution, and the amount recovered would have been assets in his hands. If they did not dispute their liability, they would have admitted that they were debtors to the estate to the amount of £80 7s. 3d.; but, under the circumstances admitted on this record, they would have claimed as against the testator's estate in respect of the £1,000 promissory note. The first question in the administration suit would have been whether this claim could have been relied on under the Statute of Set-off. If it could, the court would have held that the defendants were entitled to set off the amount of their claim and rank as creditors for the difference: but, upon the admitted facts here, the court of equity would have held that the claim was not within the Statute of Set-off, and would have insisted upon the plaintiff's claim of £80 7s. 3d. being paid; and, when the rest *of the [503 assets of the estate had been received, the defendants would have been entitled to prove as creditors and to take a dividend with the rest. In other words, they would have been obliged to pay the £80 7s. 3d. at once; and ultimately they would get a dividend on the £1,000. In this state of things, what course are we to adopt? Seeing that there can be no set-off, what are we to do with this claim and counter claim? It is obvious that the demurrer to the replication cannot be supported. The statement of claim, counter claim, and replication being good, we must give judgment according to the principles of equity. The result is that the plaintiff must have judgment for his debt and costs, including the costs of the demurrer; the defendants being at liberty to prove for the £1,000 in the administration suit, and to receive a dividend thereon ratably with the other creditors of the intestate.

ARCHIBALD, J.: I am of the same opinion. This precise question could not have arisen under the old procedure: but we are bound to apply the doctrine of equity as far as it is applicable. The plaintiff's claim is for a debt due to the estate of the intestate as the balance of his banking ac-

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count with the defendants, as his bankers. The defendants in their statement of defence and counter claim seek to avail themselves of a set-off; and I agree with my Brother Brett that the form in which it is pleaded would have been sufficient if the subject-matter had been one which could have been relied on as a set-off. But, as the claim in respect of the £1,000 promissory note did not mature in the lifetime of the maker (the intestate), it cannot be set off against a debt due to the deceased in his lifetime: both debts must be due in the same right: *Rees v. Watts* ('). If therefore it stood as a claim of set-off, it would be no answer to the action. It is then relied upon as a counter claim. The replication thereto alleges that an order was made in the Chancery Division to take an account of the debts and liabilities affecting the personal estate of the deceased, and before action notice was given to the defendants that their claim, if any, would be adjudicated upon in due course; and that, under 504] the provisions of 23 & 24 Vict. c. 38, s. 14, *any proceedings at law in respect of the said promissory note might and would have been restrained until the account directed by the above order had been taken, which has not yet taken place. If this counter claim on the promissory note, therefore, had before the passing of the Judicature Acts been made the subject of an independent action after the making of such an order as that referred to, the bank would have been restrained by the Court of Chancery from proceeding at law. Now, we are asked to give effect to the counter claim as if it had been an independent action. It comes, therefore, to this: the defence is not available as a set-off; and, if relied on as a counter claim, we are bound to restrain the defendants from taking any further proceedings in the action. The plaintiff will consequently be entitled to judgment and execution for the £80 7s. 3d. and costs; the demurrer will be overruled; further proceedings on the counter claim will be restrained; and the defendants will be at liberty to prove in the administration suit for the amount due to them for principal and interest on the promissory note.

LINDLEY, J.: I am of the same opinion. I will only add that I have looked carefully to see if there was any principle which should require a different rule as to set off in equity from that laid down by the Court of Exchequer Chamber in *Rees v. Watts* ('): but I find none. Then, as to the form of the order. It would obviously be wrong to give the defendants judgment in respect of their counter claim: that would entail consequences more extensive than would

(¹) 11 Ex., 410; 25 L. J. (Ex.), 80.

at first sight appear. Of course the defendants are not entitled to any costs, their claim under the promissory note having been asserted after decree and after notice. The proper order under the circumstances therefore will be that which I have put in writing, and which is as follows:

“Overrule the demurrer; and, the parties admitting that there are no facts in dispute, let the plaintiff be at liberty to sign judgment against the defendants for £80 7s. 3d., and the costs of the action and demurrer (such costs to be taxed); and stay all further proceedings by the defendants in this action, with liberty to them *to prove against the [505 estate of the deceased for the principal and interest due on the promissory note mentioned in their statement of defence and counter claim.”

Judgment accordingly.

Solicitors for plaintiff: *Cobbold & Woolley.*

Solicitors for defendants: *Wilde, Berger, Moore & Wilde.*

[1 Common Pleas Division, 505.]

April 25, 1876.

TRIBE and Others v. TAYLOR.

Principal and Agent—Agent's Right to Commission—Effect of Admissions at the Trial.

The defendant, being in want of additional capital in his business, on the 10th of June, 1873, wrote to the plaintiffs (accountants in London with whom he had been in correspondence on the subject), as follows: “The premises of the B. Works in this town are my property solely, but the business of it is carried on by myself and my partner. In case of your introducing a purchaser of all the premises, or part of them, of whom I shall approve, or in case of your introducing capital which I should accept, I could pay you a commission of 5 per cent. on the amount in either case, provided no one else is entitled to a commission in respect of the same introduction.” The plaintiffs succeeded in introducing one W. to the defendant, who advanced him by way of loan a sum of £10,000, upon which the plaintiffs received the agreed commission. Some few months afterwards the defendant and W. entered into an agreement for a partnership, on which occasion W. made a further advance of £4,000 by way of capital to the concern. The plaintiffs claimed commission upon this further advance; and, in an action brought, to enforce their claim, they admitted that the advance of the £4,000 was not contemplated at the time of the advance of the £10,000, but that the £4,000 was advanced solely in consequence of the negotiation for the partnership between the defendant and W.:

Held, that the plaintiffs were not entitled to commission on this second advance.

THE first count of the declaration stated that the plaintiffs carried on business under the style or firm of Barnard Clarke, McLean & Co., and the defendant, by a certain instrument in writing addressed to the plaintiffs and signed by the defendant, promised the plaintiffs in the words and figures following, that is to say,—

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Tribe v. Taylor.

14 *Hamilton Sq., Birkenhead*, 10 June, 1873.

Messrs. Barnard Clarke, McLean & Co., Lothbury.

Gentlemen,—The land and premises of the Britannia Works in this town are my property solely, but the business of it is carried on by myself and my partner. *In case of your introducing a purchaser of all the premises, or part of them, of whom I shall approve, or in case of your introducing capital which I should accept, I could pay you a commission of 5 per cent. on the amount in either case, provided no one else is entitled to a commission in respect of the same introduction.

I cannot, however, place this exclusively and indefinitely in your hands; but must have the liberty to accept or reject any offer made by yourselves for your friends at any time during the negotiation; and, unless I accept any offer, no commission is to be paid by me. I do not mention this with the idea of at once opening up other channels for accomplishing my object as against your own efforts, but merely to retain the power over my property in case I should require to exercise it in any other direction; and this you will see is only reasonable and proper.

(Signed)

J. TAYLOR.

Averment, that the persons to whom the said instrument was addressed were the plaintiffs, and the name J. Taylor attached to the said instrument was the signature of the defendant; and that they, the plaintiffs, did at divers times introduce capital to the defendant, and the defendant accepted the same, and that all conditions were fulfilled and all times elapsed and all things happened necessary to entitle, and nothing happened to disentitle, the plaintiffs to maintain this action in respect of the matters hereinafter mentioned: Breach, that, although the defendant had paid to the plaintiffs a commission of 5 per cent. on part of the amount of capital introduced by the plaintiffs to the defendant; yet the defendant had not paid to the plaintiffs a commission of 5 per cent. on the residue of the amount of capital introduced by the plaintiffs to the defendant, and the same remained due and unpaid to the plaintiffs.

There was also a count for work and labor, commission, interest, and money due on accounts stated.

Pleas, to the first count, that defendant did not promise as alleged; that plaintiffs did not introduce at divers times capital to defendant, nor did defendant accept the same as alleged; denial of the alleged breaches; to the second

count, never indebted; and to both counts, payment. Issue thereon.

The cause was tried before Lord Coleridge, C.J., at the sittings in London after last Trinity Term. The facts were as follows: In May, 1873, the defendant, who carried on the business of an engineer and iron founder at Birkenhead, being desirous of obtaining increase of capital for carrying on his works, entered into a *correspondence with the [507 plaintiffs, accountants in London, for the purpose of finding some person willing to become a partner in his business or to advance him money by way of loan: and ultimately the defendant wrote to the plaintiffs the letter set out in the first count of the declaration. The plaintiffs did procure one Frederick Whatley Wood to lend the defendant £10,000, and they received for so doing the stipulated commission of £500.

Afterwards, in December, 1874, Wood advanced the defendant a further sum of £4,000 under an agreement for a partnership. The plaintiffs claimed under the agreement declared on a commission of 5 per cent. upon this last-mentioned sum, as being capital introduced by them and accepted by the defendant. It was admitted, however, that the advance of the £4,000 was not contemplated at the time of the advance of the £10,000; and that the £4,000 was advanced in consequence of the negotiation for a partnership between Taylor and Wood.

Under the direction of his Lordship, a verdict was taken for the plaintiffs for £200, leave being reserved to the defendant to move to enter the verdict for him if the court should be of opinion that the agreement for commission was exhausted by the first advance.

Herschell, Q.C., and A. L. Smith, moved accordingly: At the time of the negotiation for the loan of £10,000, a partnership between Taylor and Wood was not in contemplation. That transaction was completely closed. The plaintiffs had nothing whatever to do with the negotiations which subsequently resulted in a partnership. The agreement clearly contemplated but one transaction: and it may well be doubted whether any commission would have been payable to the plaintiffs upon the £4,000 even if it had been an advance by way of loan, and no partnership had been formed or contemplated. To entitle them to succeed here, the plaintiffs must satisfy the court that they could charge the defendant with commission upon any moneys which Wood might bring in as capital at any time whilst the partnership endured.

Alfred Wills, Q.C., and Bremner, contra: If the advance of the £4,000 under the arrangement for a partnership was the fair result of the introduction of the plaintiffs, the latter are entitled to the stipulated commission, upon the principle 508] laid down by Erle, C.J., *in *Green v. Bartlett* ('). If the second advance of capital had taken place twenty years after the first, there would be much force in the defendant's objection. The sole question is whether the second advance was an advance within the contemplation of the parties: and that was a question for the jury.

Herschell, Q.C., in reply: One transaction only was contemplated by the letter of the 10th of June, 1873. It being admitted that the second advance was not contemplated at the time of the first advance, and was made solely in consequence of the negotiation for a partnership, the proximity of time is immaterial.

LORD COLERIDGE, C.J.: I do not feel quite free from doubt: but, upon the whole, I am of opinion that the verdict must be entered for the defendant. The question turns upon the construction of the letter of the 10th of June, 1873. The defendant being desirous of increasing his business capital, writes as follows: "In case of your introducing a purchaser of all the premises, or part of them, of whom I shall approve, or in case of your introducing capital, which I should accept, I could pay you a commission of 5 per cent. on the amount in either case." That proposal is accepted by the plaintiffs in terms which do not alter the matter. Shortly after that, viz., in August, 1873, a person named Wood, who was introduced by the plaintiffs, advanced the defendant £10,000; and the commission upon that advance was paid. Subsequently to that, and in one sense in consequence of that introduction, Wood got into a negotiation with the defendant, and in December in the following year became a partner in his business, and advanced a further sum of £4,000. Upon this the question arises whether the plaintiffs are entitled to a commission of 5 per cent. on that second advance. Was that, within the fair meaning of the letter of the 10th of June, 1873, an introducing of capital by the plaintiffs? It is suggested by Mr. Bremner, and truly suggested, that that is a question for the jury. At the trial, Mr. Smith was anxious to go to the jury upon it. And it was to avoid that that the admission was made by the plaintiffs' counsel that the advance of the £4,000 was not contemplated at the time of the advance of the £10,000, but that the £4,000 was advanced in consequence

(') 14 C. B. (N.S.), 681; 32 L. J. (C.P.), 261.

*of the negotiation for a partnership. Regard being [509 had to the period of the trial at which this admission was made, I think the fair effect of it is, that the advance of the £4,000 was made as part of the negotiation for the partnership only, and without any reference to the antecedent advance of the £10,000. How can that be said to be an introducing of capital in pursuance of the agreement? To entitle the plaintiffs to commission, I think the capital must be introduced by the act of the plaintiffs. The true effect of the admission is that the advance of the £4,000 was not the consequence, directly or indirectly, of the negotiations referred to in the letter of the 10th of June, 1873; and therefore upon the whole I think the contract declared on was satisfied by the payment of the £500, and that the defendant is entitled to the verdict.

BRETT, J.: The true construction of this contract, as it seems to me, is, that the plaintiffs are to have a commission of 5 per cent. for the introduction by them of capital into the defendant's business at any time after the date of the contract. I do not think the agreement to pay commission is confined to advances made in any particular time or to an advance of one amount; but I think it applies to advances at any number of times. Nor do I think it is confined to capital introduced in any particular form; but it applies equally to advances by way of loan and to advances in the shape of a partnership. The question which arose at the trial was this, whether the advance of the £4,000 was the result of any act of the plaintiffs. If in December, 1874, the plaintiffs had introduced any new person, who had advanced the money, I should have thought the defendant would have been bound to pay them the commission claimed. If they had induced Wood to become a partner and to introduce further capital, I should have thought they would have been entitled to commission on that. But I think Mr. Bremner was right in saying that the question is whether the partnership was caused by any act of the plaintiffs. Now, the only act they do is the original act of introduction which led to the advance of £10,000. Was the subsequent partnership the result of that introduction or of an independent negotiation between the defendant and Wood? *Causa proxima* is *not the [510 question: the plaintiffs must show that some act of theirs was the *causa causans*. Considering the question raised at the trial, and which Mr. Smith wished to have left to the jury, and the admission which was made to meet that argument, I think the admission must be interpreted as meaning

that the partnership was brought about by an original agreement between the defendant and Wood, and not by the act or intervention of the plaintiffs. It is true that the advance of the £4,000 might not, and probably would not, have been made by Wood, but for the original introduction of the plaintiffs. But that is not enough. I think the plaintiffs have not brought the advance of the £4,000 within the contract declared on.

LINDLEY, J.: I also am of opinion that the defendant is entitled to have the verdict entered for him. The case really turns upon the construction to be put upon the defendant's letter of the 10th of June, 1873, and the admission made by the plaintiffs' counsel at the trial. Looking at these, the only question is whether the £4,000 brought into the defendant's business by Wood in December, 1874, can be considered as capital brought in through the intervention of the plaintiffs. What had the plaintiffs to do with that advance? Only this. A few months before that advance was made, the plaintiffs had introduced Wood to the defendant, and that introduction resulted in an advance by Wood to the defendant by way of loan of £10,000. That was capital introduced into the defendant's business through the intervention of the plaintiffs, for which they were entitled under the contract of the 10th of June, 1873, to receive, and for which they did receive, a commission of 5 per cent. But, in my opinion, that agreement was never intended to extend to anything which might thereafter be introduced in the shape of capital, unless brought about through the intervention of the plaintiffs. And, when we look at the admission made at the trial, that the advance of the £4,000 was not contemplated at the time of the £10,000 advance, and that the subsequent advance of the £4,000 was made in consequence of the negotiation for a partnership, I cannot help thinking that the only sum introduced by the plaintiffs under the terms of the contract contained in the 511] letter of the 10th of June, *1873, was the £10,000. I observe that at the date of that letter there was already a partnership subsisting between the defendant and another person.

Judgment for the defendant.

Solicitors for plaintiffs: *Ashurst, Morris & Co.*

Solicitors for defendant: *Gregory, Rowcliffes & Rawle.*

[1 Common Pleas Division, 511.]

April 25, 1876.

FISHER V. THE VAL DE TRAVERS ASPHALTE COMPANY.*Measure of Damages for Breach of Contract—Costs of consequent Litigation—Proximate Cause.*

The plaintiff contracted with a Tramway Company to construct a tramway for them in a public road, and made a sub-contract with the defendants (an asphalte company) under which the latter undertook to lay the asphalte and to keep it in good repair and condition for twelve months. In consequence of the defective state of the asphalte within that period, one H., who was driving along the road, was thrown out of his cart and injured. H. thereupon brought an action against the Tramway Company, who gave notice to the plaintiff. The plaintiff then called upon the defendants to defend H.'s action, but they declined to have anything to do with it. The plaintiff resisted H.'s claim, and ultimately compromised it for £70, but was obliged also to pay £40 for the costs of H.'s attorney, and expended £18 more for the costs of defending the action. The jury found that the course taken by the plaintiff in resisting and ultimately compromising H.'s action was a reasonable and proper one:

Held,—upon the authority of *Bazendale v. London, Chatham and Dover Ry. Co.* (Law Rep., 10 Ex., 35; 12 Eng. Rep., 496),—that the defendants were liable for the £70, but not for the £40 or the £18, these latter charges not being "the natural or necessary consequence" of their default, the contracts between the plaintiff and the Tramway Company and between the plaintiff and the defendants being separate and independent contracts.

THE first count of the declaration stated that the plaintiff was the contractor for the construction of a tramway in Mare street, Hackney, belonging to the North Metropolitan Tramways Company, and had agreed with the defendants to lay with Val de Travers asphalte and concrete in a workmanlike and efficient manner the said tramway, and to keep and maintain the said asphalte and concrete in good order and condition for twelve months after being so laid as aforesaid, and that all conditions were performed and all things happened and all times elapsed necessary to entitle the plaintiff to have the said asphalte and *concrete [512 so laid and so kept and maintained as aforesaid: Breach, that the defendants made default therein, and did not lay the said asphalte in an efficient and workmanlike manner as aforesaid, nor did they keep and maintain the said asphalte and concrete after being so laid as required by the contract, but suffered the said asphalte and concrete to sink and become out of repair and worn out; and by reason of the premises a certain person lawfully driving along the said public road upon which the said tramway was laid was thrown from his cart and injured, &c., and, being entitled so to do, made a claim against the North Metropolitan Tramways Company, and the said company reasonably

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and properly settled the same, and the plaintiff became liable to and had been called upon to indemnify, and actually had indemnified, the said company against such claim so settled by the said company.

The second count stated that the plaintiff became liable to compensate the person injured for the injuries sustained and the expense incurred by reason of the defendants' default.

Plea, not guilty.

The cause was tried before Denman, J., at the sittings in London after Trinity Term last. The facts were as follows: The North Metropolitan Tramways Company had contracted with Fisher for the construction of a tramway in the parish of Hackney. Fisher made a sub-contract with the defendants to concrete and asphalte the roadway, and to keep and maintain it in good order and condition for twelve months. Within the twelve months the roadway got out of repair, and one Hicks, who was driving along the road, in consequence of the defective condition of the asphalte, was thrown from his cart and injured. Hicks thereupon commenced proceedings against the Tramway Company, and they gave notice thereof to the plaintiff. The plaintiff informed the defendants of the claim made by Hicks; but they declined to interfere, telling him he might do as he liked. The plaintiff having taken upon himself the defence of the action by Hicks against the Tramway Company, his solicitor settled the claim by the payment of £110, being £70 for damages, and £40 for costs. This sum, together with £18, the costs paid by the plaintiff to his own solicitor, was sought to be recovered in this action.

513] *The learned judge left it to the jury to say whether Fisher acted reasonably in compromising Hicks's claim. They found that he did; and a verdict was thereupon entered for the plaintiff for £128.

In the last Michaelmas sittings, the court refused a rule for a new trial which was moved for on the ground that the action was not maintainable, and that decision was affirmed on appeal⁽¹⁾; but they granted a rule *nisi* to reduce the damages by the two sums of £40 and £18.

Murphy, Q.C., and *Lanyon*, showed cause: The jury having found that the plaintiff acted reasonably in settling the claim of Hicks against the Tramway Company, he is entitled to recover from the defendants not only the amount of compensation which he paid to Hicks, but also the costs necessarily and properly incurred in ascertaining such

(1) *Ante*, p. 259.

amount. That a party is entitled, on the breach of a contract, to recover all such damages as are the natural and necessary result of the breach, is established by a long series of authorities, beginning with *Hadley v. Baxendale* (1) and ending with *Horne v. Midland Ry. Co.* (2). In *Mayne on Damages*, 2d ed., pp. 43, 46, it is said: "It frequently happens that one person is forced to incur expense in legal proceedings in consequence of a breach of contract or tortious act of another." "The question in these cases is, whether the plaintiff, in defending the action, did what a reasonable man would do under similar circumstances, where he had no other judgment but his own to resort to." *Short v. Kalloway* (3); *Ronneberg v. Falkland Islands Co.* (4); *Godwin v. Francis* (5); *Tindall v. Bell* (6); *Collen v. Wright* (7). The defendants will rely upon *Baxendale v. London, Chatham and Dover Ry. Co.* (8). There, H. having contracted with the plaintiffs, who were carriers, for the carriage of two pictures from London to Paris, the plaintiffs contracted with the defendants for the carriage by the defendants of the pictures over a part of the *dis- [514 tance. The pictures were damaged on the journey by the defendants' negligence. H. thereupon brought an action against the plaintiffs, who gave notice of it to the defendants, and requested them to defend it. The defendants refused, and told the plaintiffs to take their own course. The plaintiffs defended the action brought against them by H. without success, and then brought an action against the defendants to recover not only the damages found by the jury to have been sustained by H., but also the costs of the unsuccessful defence. The defendants paid the damages into court, but disputed their liability as to the costs. It was held by the Exchequer Chamber that the costs were not recoverable, inasmuch as they could not be considered as the natural consequence of the defendants' default, the contracts between H. and the plaintiffs and between the plaintiffs and the defendants having been separate and independent. Lord Coleridge, C.J., there says (9): "It seems to me that the whole of the costs were incurred for the plaintiffs' own benefit, and were not in any sense the natural and proximate result of the defendants' breach of duty. The judgment appears to me to have proceeded wholly upon the case of *Mors le*

(1) 9 Ex., 341.

(2) Law Rep., 7 C. P., 583.

(3) 11 Ad. & E., 28.

(4) 17 C. B. (N.S.), 1; 34 L. J. (C.P.), 34.

(5) Law Rep., 5 C. P., 295.

(6) 11 M. & W., 228, 232.

(7) 7 E. & B., 301; 26 L. J. (Q.B.), 147; affirmed on error, 8 E. & B., 647;

27 L. J. (Q.B.), 215.

(8) Law Rep., 10 Ex., 35.

(9) Law Rep., 10 Ex., at p. 42.

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Blanche v. Wilson (¹), which is certainly very like this case, and which, if necessary, should in my opinion be overruled." Lush, J., said: "This is not, as the court below appear to have thought, a case in which a person incurs a liability in consequence of the neglect or default of another in some duty owing to him." The defendants incurred no liability to Harding, and their liability to the plaintiffs was quite apart from any liability of the plaintiffs to Harding. The costs of defending Harding's action, therefore, cannot be said to be the consequence of the defendants' default. The two things have no connection whatever with each other." Quain, J., said: "The cases which have been referred to, with one exception, are all cases of indemnity, and really have no application here; for, we have to deal with two separate and independent contracts, and it would, it seems to me, be very unreasonable to hold that the plaintiffs should be able to charge the defendants against their will and without their sanction with the costs of an action brought upon a contract made by the plaintiffs with Harding, to which the defendants were no parties, and with which they had no concern." And Archibald, J., said: "These costs cannot be claimed by reason of the defendants having given any actual authority to incur them. Nor were the plaintiffs compelled to incur them by reason of the defendants' default. In other words, they were not the natural and necessary consequence of that default. The contracts are wholly independent, and the damages recovered against the plaintiffs by Harding were not of necessity the same as those which the plaintiffs could recover against the defendants. The assessment in the first action could not in any shape be conclusive against the defendants." It could not be said there that the defence of Harding's action was reasonable.

[BRETT, J.: Suppose Hicks had claimed £1,000, and the plaintiff paid it without dispute, could he have recovered that from the defendants?]

Clearly not.

[BRETT, J.: Having reduced the claim by disputing it, the costs incurred in so doing are not recoverable. That seems to be the result of the decision in *Baxendale's Case* (²).]

Neither *Collen v. Wright* (³) nor *Ronneberg v. Falkland Islands Co.* (⁴) was cited in *Baxendale v. London, Chatham*

(¹) Law Rep., 8 C. P., 227.

affirmed on error, 8 E. & B., 647; 27

(²) Law Rep., 10 Ex., 35.

L.J. (Q.B.), 215.

(³) 7 E. & B., 301; 26 L. J. (Q.B.), 147;

(⁴) 17 C. B. (N.S.), 1; 34 L. J. (C.P.), 34.

and Dover Ry. Co. ⁽¹⁾; and there was no verdict of a jury in the last-mentioned case. Here, the defendants knew they had contracted to lay asphalte in a public street, and that the plaintiff was under a contract with the Tramway Company to do the whole work. They knew that accidents might happen from any default on their part, and that claims for damages would consequently arise, and that legal expenses must be incurred. All this, therefore, must be taken to have been in their contemplation when they entered into the contract in question. The Court of Appeal having decided that the plaintiff is entitled to recover the amount of the damages paid by him to Hicks, the costs incurred in that action must follow as an accessory, these being equally the proximate and natural consequence resulting from the defendants' breach of contract.

* *Philbrick*, Q.C., was not called upon to support [516 the rule.

BRETT, J.: I am of opinion that this rule must be made absolute. This is an action brought by the plaintiff against the defendants for breach of a contract to lay a certain tramway with asphalte and concrete, and to keep and maintain the road in good order and condition for twelve months after being so laid; and the breach is that the defendants did not lay the asphalte in an efficient and workmanlike manner, nor keep and maintain the work as required by the contract. Upon the facts, it must be taken that the defendants were guilty of that breach: and the proper measure of damage would be the cost of putting the road in a proper state of repair. Something else, however, happened: One Hicks, in consequence of the defective state of the road, sustained personal injury, and brought an action against the Tramway Company for negligence. Now, there can be no doubt that the Tramway Company were liable to Hicks, and that Fisher would under his contract with the Tramway Company be liable to them; and the question is what would be the extent of their claim. The claim of Hicks was a claim for unliquidated damages. Upon receiving notice from Hicks's solicitor the Tramway Company forwarded it to Fisher, and Fisher gave notice to the defendants. The defendants declined to have anything to do with the matter. The plaintiff, thereupon, taking up the case of the Tramway Company, enters into negotiations for settling Hicks's claim; and ultimately he settled it for a certain sum, viz., £70. But Hicks had incurred costs to the extent of £40, which the plaintiff had also to pay. The

(1) Law Rep., 10 Ex., 35.

plaintiff had also incurred £18 costs to his own attorney; and it is to recover these three amounts that the present action is brought.

The plaintiff's contention in effect is this: In consequence of your (the defendant's) breach of contract with me, a man met with an accident, and I was compelled to pay him damages, and also, in order to ascertain the proper amount to be paid to him, you having refused to interfere, I was bound to defend the action in order to prevent his obtaining more than he was justly entitled to; and the jury have found that I did a reasonable thing in so doing; and I claim as the natural consequence of your breach of 517] *contract, not only the cost of putting the road in repair, but also the sum which I paid for damages and costs in Hicks's action, and the costs of my own attorney. To this the defendants answer that the damages paid to Hicks and the costs incurred by the plaintiff in ascertaining the proper amount of those damages, were not the natural and necessary consequence of their breach of contract.

Now, the Court of Exchequer Chamber has said, in the case of *Baxendale v. London, Chatham and Dover Ry. Co.* (¹), that, though there is no contract to pay such damages, yet the plaintiff is entitled under circumstances such as these to recover them from the defendant, because the injury to the claimant was the natural consequence of the defendants' breach of contract, and the payment of the damages was equally the natural consequence of the breach. The question then is, whether, where the damages are so far the natural consequence of the defendants' breach of contract, the costs incurred by the plaintiff in ascertaining the amount of those damages is not equally the natural and direct consequence of such breach of contract. It is said there is no contract to pay these costs. That observation, however, applies equally to the damages. But for the case referred to, I must confess I should have been unable to see any distinction between the damages and the reasonable costs of ascertaining their proper amount. But I cannot help thinking that the question is concluded by the decision in *Baxendale v. London, Chatham and Dover Ry. Co.* (¹), and that, assuming the damages paid to the person injured to be the direct and natural consequence of the defendants' breach of contract, yet the costs of ascertaining the proper amount of those damages are not sufficiently direct, however reasonably incurred. I can discover no distinction between the two cases in this respect. So far,

(¹) Law Rep., 10 Ex., 35.

therefore, as the costs of the plaintiff in Hicks's action and the costs incurred by the present plaintiff are concerned, I think the present case is within the principle of that case. But for that decision, I must confess I should have thought the costs must follow the damages. As, however, we are bound by authority, the rule to reduce the damages must be made absolute.

LINDLEY, J.: I am of the same opinion, and for the same *reasons. I am unable to distinguish this case in [518 principle from *Baxendale v. London, Chatham and Dover Ry. Co.* (').

LORD COLERIDGE, C.J.: I also think this case is concluded by authority: and it is not so clear to my mind that I should not, in the absence of that case, have held the same. The cases are all cases of one contract. Here there are two. The Tramway Company contract with Fisher; Fisher contracts with the defendants, and the claim of Hicks arises from negligence of the latter. Are the defendants to be liable to three sets of costs, because the actions may have been reasonably defended? If they are, the consequences may be serious. If not, at which link of the chain are the costs to drop out? It would be extremely difficult to lay down any principle upon which it could be said that one set of costs would be reasonable and not another. The rule must be absolute to reduce the damages to £70.

Rule absolute.

Solicitors for plaintiff: *Stevens, Wilkinson & Harries.*

Solicitors for defendants: *Drake & Son.*

(') Law Rep., 10 Ex., 85.

See 12 Eng. Rep., 506 note.

One who is benefited by the prosecution of an action, of which he has notice, is to be regarded as a party in interest, although his name does not appear therein, and he is bound by the judgment rendered: *Conger v. Chilcote*, 42 Iowa, 18; *Strong v. Phoenix Ins. Co.*, 62 Mo., 289; *Wood v. Ensel*, 63 Mo., 193.

No particular form of notice of the pendency of the action is required, and it may be given either orally or in writing: *Conger v. Chilcote*, 42 Iowa, 18.

In an action in which A. was defendant, B. testified as a witness and procured other testimony for the defence, consulted with A.'s attorney, was informed by him that he himself was liable to plaintiff in the same action, and admitted his liability: Held,

that these facts established notice to B., and were sufficient to raise a presumption that he was requested to defend: *Conger v. Chilcote*, 42 Iowa, 18; *Wood v. Ensel*, 63 Mo., 193; *O'Humwa v. Parks*, 43 Iowa, 119.

Otherwise it seems from the mere fact that the party was called as a witness: *Merritt v. Nevin*, 20 Upper Can. Q. B., 540.

Where one deposits building materials in a public street, or otherwise obstructs such a street, in consequence of which a traveller who is injured recovers against the city, he is liable, if he have notice of the suit, for the amount of the recovery, and is concluded thereby: *Village, etc., v. Zilinski*, 8 Hun, 571; *Chicago v. Robbins*, 2 Black., 418; *Id.*, 4 Wall., 657; *Rochester v. Montgomery*, 9 Hun, 394;

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Brooklyn v. R. R. Co., 47 N. Y., 481;
Troy v. R. R. Co., 49 N. Y., 657;
Stoughton v. Porter, 13 Allen, 191;
Boston v. Worthington, 10 Gray, 496;
Lowell v. R. R. Co., 23 Pick., 24;
Woburn v. Henshaw, 101 Mass., 193;
O'Humwa v. Parks, 43 Iowa, 119.

Though if the city appeal from the judgment without the instance of such wrongdoer, he is not liable for the costs of the appeal: O'Humwa v. Parks, 43 Iowa, 119.

A grantee under a warranty deed, against whom a writ of entry has been brought, is not bound to permit the grantor to defend, and a refusal to do so will not discharge the grantor's liability for a breach of the covenant of warranty: Boyle v. Edwards, 114 Mass., 373.

Where a suit has been defended with the advice or acquiescence of one who would be benefited by, or has an interest in, a successful defence, he is liable for the costs of the defence: Strong v. Phoenix Ins. Co., 62 Mo., 289; Smith v. Davidson, 4 Upper Can. Q. B., 191.

One who upon reasonable grounds defends an action of ejectment against him, may recover the costs of the defence in an action against his grantor, upon the latter's covenant of title: Brennan v. Lewis, 8 Upper Can. Q. B., 191; Clark v. Robertson, 8 id., 370; Stuart v. Mathieson, 23 Upper Can. Q. B., 135; Stubbs v. Martindale, 7 Upper Can. Com. Pl., 52.

Where one without intentional wrong on his part has been induced by the fraud of another to do an act for which he has been held accountable, as for a wrong committed against a third party, he may recover against the party so inducing him to do such act. The relation of principal and surety does not however exist, as that grows out of the consent of the parties.

Where parties by fraud have induced another innocently to convert the property of a third for their benefit, and have undertaken his defence of a trover suit brought by the latter, and have failed, and execution has been levied on his property sufficient to satisfy the judgment, the measure of damages in his action against them for the fraud, is the amount of the judgment against him with interest, though he has not in fact paid such judgment: Kenyon v. Woodruff, 33 Mich., 810.

See Merritt v. Nevin, 20 Upper Can. Q. B., 540.

Action by a stakeholder, alleging that he had paid over the wager to the defendant, one of the parties thereto, on his agreeing to indemnify him; that R., the other party to the wager, sued and recovered judgment against the plaintiff, but that defendant did not indemnify. Defendant pleaded that the plaintiff falsely represented to him that R. had not demanded the wager from him, and that on the faith of such statement he promised to indemnify. The plaintiff produced an exemplification of the judgment recovered against him by R., the pleadings and issues in which showed that the jury must have found a demand by R. This, it was contended, was evidence of such demand in this action; but held, that at all events, it would not prove defendant's plea, which was not supported by the other evidence:

Held, also, that the costs of the suit brought by R. could, on the evidence, be recovered: Mayber v. Turley, 27 Upper Can. Q. B., 444.

As to last proposition, see also Stuart v. Mathieson, 23 U. C. Q. B., 135; Spencer v. Hector, 24 id., 277; Stubbs v. Martindale, 7 U. C. C. Pl., 447.

As to whether the principal is bound to refund to his surety costs of proceedings taken against the surety to enforce payment of the debt of the principal.

See 12 Eng. Rep., 507 note; Whitehouse v. Glass, 7 Grant's (U.C.), Chy., 45.

Though one is not liable for the costs of a defence not made with reasonable cause, or for the costs of a suit not brought upon reasonable grounds of success: Corbett v. Lake, 5 Upper Can. Q. B., 454; Taylor v. Strachan, 16 Upper Can. Q. B., 76.

The defendant, owner of an equity of redemption in land, subject to a power of sale mortgage to secure his promissory note, conveyed it by a deed by which the grantee assumed and agreed to pay the mortgage; the grantee conveyed it to the plaintiff with full covenants of warranty; the mortgagee advertised the land for sale under the power; the plaintiff, to prevent the sale, paid the mortgage, together with the expenses of advertising the sale, and the mortgagee indorsed the mort-

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gage note to him. In an action on the note, and to recover the amount of expenses paid, held, that the plaintiff could recover upon the note, but could not recover the expenses, there being as to these no privity between the parties to the suit: *Bock v. Gallagher*, 114 Mass., 28.

A judgment in ejectment is not conclusive proof of ouster in an action for *mesne* profits. In such a suit, however, in Canada, it was held the tenant in common was entitled to recover the costs of the ejectment suit: *Steen v. Steen*, 21 Upper Can. Q. B., 454.

[1 Common Pleas Division, 518.]

July 8, 1876.

WALKER and Another v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Building Contract—Interpretation of Contract—Penalty for Delay—Notice to avoid the Contract—Forfeiture of Implements and Materials.

A building contract by which the plaintiffs contracted with the defendants to construct a dock and other works in connection therewith, provided as follows: "Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works, as hereinafter mentioned, to the satisfaction of the engineer, his contract shall, at the option of the company but not otherwise, be considered void as far as relates to the works or maintenance remaining to be done; and all sums of money that may be due to the contractor, together with all materials and implements in his possession and all sums named as penalties for the non-fulfilment of the contract, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract." The contract provided that "the whole of the works should be entirely completed on or before the 31st of August, 1873." The works were not completed by that date.

*There were other clauses in the contract in the following terms:

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"If the contractors shall not complete the said works within the period limited for the purpose, or if they shall become bankrupt, or if from any cause whatever (not arising from any acts done or omitted to be done by the said company contrary to the true intent and meaning of these presents) they shall be delayed or prevented in the completion of the said works according to the specification, it shall be lawful for the company, without any previous notice, to take the works entirely or in part out of their hands, and to employ any other contractor to complete the same."

"Should the engineer be at any time dissatisfied with the nature or mode of proceeding with, or at the rate of progress or maintenance of, the works, or any part thereof, he shall have full power to procure and make use of all labor and materials from the money that may then be due or that may become due to the contractor, but it is hereby expressly declared that the possession of this power by the engineer shall not in any degree relieve the contractor from his obligation to proceed in the execution of and complete the works with the requisite expedition or to maintain them as hereinafter mentioned."

On the 22d of January, 1874, and consequently after the time fixed by the contract for completion of the works, the defendants gave notice to the plaintiffs to avoid the contract and thereupon took possession of the works and of the materials and implements of the plaintiffs:

Held, that upon the true construction of the contract the clause above set forth, with reference to the avoidance of the contract and the forfeiture of the contractors' implements and materials, could only be enforced before the time originally fixed for completion of the works had expired.

Roberts v. Bury Improvement Commissioners (Law Rep., 4 C. P., 755) distinguished.

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SPECIAL CASE. The plaintiffs were contractors who had entered into a contract with the defendants to construct a dock and certain works in connection therewith. The defendants had, under a clause in the contract, given notice to the plaintiffs to avoid the contract, and had taken possession of certain implements and materials of the plaintiffs.

The facts and material clauses of the contract and the arguments sufficiently appear from the judgment.

The questions for the decision of the court were :

1. Whether, upon the facts and under the circumstances stated, the notice given by the defendants, bearing date the 22d of January, 1874, was valid and effectual to avoid the contract of the 17th of March, 1871, so far as related to the works or maintenance remaining to be done, and to cause to be forfeited to the defendants all sums of money due to 520] the plaintiffs, together with *all materials and implements in their possession and all sums of money named as penalties for the non-fulfilment of the said contract, or whether the notice was valid and effectual for any, and, if so, which, of the said purposes ?

2. Whether, upon the facts and under the circumstances aforesaid, the contract was avoided and the defendants were justified in point of law in taking possession of the plaintiffs' implements and materials ?

May 15. *Bidder*, Q.C., (*J. C. Mathew* with him), for the plaintiffs.

Sir *J. Holker*, A.G., (*Edwards*, Q.C., with him), for the defendants.

Cur. adv. vult.

July 3. The judgment of the court (Brett and Archibald, J.J.) was delivered by

ARCHIBALD, J.: The question submitted to us by the special case depends on the true construction of a clause in the contract which is set out in it.

In the early part of 1870, the defendants being desirous of having a dock and channel, and other works in connection therewith, constructed at Garston, near Liverpool, prepared a specification of the works to be done, and a schedule and statement of quantities, for the purpose of receiving tenders.

The plaintiffs, who are contractors for public works, tendered, on the 19th of August, 1870, for the construction of the works for the sum of £114,011 6s. 10d., and the tender was accepted. On the 17th of March, 1871, an agreement was duly executed under the hands of the plaintiffs and

under the seal of the defendants for the execution of the work by the plaintiffs, for the said sum of £114,011 6s. 10d., by which the plaintiffs agreed to execute the works mentioned and referred to in the specifications, bill of quantities, schedule of prices, and plans, in strict conformity therewith, and to observe the conditions set out in the specification, and that all the powers, liabilities, rights, and privileges mentioned therein, and conferred thereby in respect of such works, might be exercised according to the true intent and meaning thereof.

It was also provided by the agreement as follows,—that “if the said contractors, their executors or administrators, shall not *complete the said works within the period [52] limited for that purpose, or if they shall become bankrupt, or if from any cause whatever (not arising from any act or acts done or omitted to be done by the said company contrary to the true intent and meaning of these presents) they shall be prevented from or delayed in proceeding with the completion of the said works according to the said specification, it shall be lawful for the said company, without any previous notice being given to the said contractors, their executors or administrators, or their successors, to take the said works entirely or in part out of their or his hands, and to employ any other contractor or contractors, workman or workmen, either by contract or measure and value, or otherwise to proceed with the said works and complete the same, and in such case the said contractors, their executors or administrators, shall only be entitled to receive such sums as shall have actually accrued due at the time of the works being taken out of their hands as aforesaid, and all expenses incurred by so doing shall be deducted and retained from the money due to the original contractor, or shall be recoverable as liquidated damages by action at law or otherwise. And it is hereby lastly declared and agreed that this agreement shall be taken and construed to be not to prejudice, but to be in confirmation and enlargement of and in addition to and extension of the said specification, and the stipulations and provisions therein contained.”

The said specification contained the following provisions:

“The contractor shall from time to time make such alterations in the works as the engineer may think necessary.”

“It must be distinctly understood that the whole of the works on this contract are to be executed strictly in accordance with the drawings that may be supplied from time to time, and to the entire satisfaction of the engineer, who, however, reserves to himself the right to make any altera-

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tions he may think fit during the progress of the works, but no claim is to be made by the contractor for such alterations, the work being measured and paid for at the list of prices named in the schedule.

"The decision of the said William Baker, or other principal engineer of the railway company for the time being, with respect to the amount, state, and condition of the 522] works actually executed, *and also in respect of any and every question that may arise concerning the construction of the aforesaid contract, tender, or this specification, or the execution of the works hereby contracted for, or any other matter or thing whatsoever relating to the same, shall be final and binding on the contractor and the company, and without appeal."

"Progress and maintenance of works. Should the engineer be at any time dissatisfied with the nature or mode of proceeding with, or at the rate of progress or maintenance of, the works, or any part thereof, he shall have full power to procure and make use of all labor and materials from the money that may be then due or that may become due to the contractor. But it is hereby expressly declared that the possession of this power by the engineer shall not in any degree relieve the contractor from his obligations to proceed in the execution of and to complete the works with the requisite expedition, or to maintain them as hereinafter mentioned."

And then follows the clause which is in question :

"Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works as hereinafter mentioned to the satisfaction of the engineer, his contract shall, at the option of the company, but not otherwise, be considered void as far as relates to the works or maintenance remaining to be done, and all sums of money that may be due to the contractor, together with all materials and implements in his possession, and all sums named as penalties for the non-fulfilment of the contract, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract."

"Time of completion. The whole of the works are to be entirely completed on or before the 31st of August, 1873, and the contractor will be subject to a penalty of £100 per week for each week the works remain unfinished beyond the time stated."

The contractor entered upon the work early in the month

of June, 1871, and continued down to the 22d of January, 1874.

Up to the 31st of August, the time limited for the completion of the original contract, certificates had only been given for £50,040.

*Extensive and important alterations in and additions to the works as originally designed were from time to time made by Mr. Baker, the engineer of the company, who also suspended some of the works for long spaces of time.

After the 31st of August, 1873 (the day fixed for completion of the works), Mr. Baker supplied the plaintiffs with new and altered designs for portions of the works, and monthly certificates of work done were given and paid down to the 10th of January, 1874.

During the years 1872 and 1873 some complaints were made by Mr. Baker that the plaintiffs did not make satisfactory progress with the works, and on the 16th of October, 1873, the following letter was addressed by the plaintiffs to Mr. Baker:

“Garston Dock Company.

“Dear Sir,

“The period having expired within which the works included in the original contract were to have been completed, and there still being much work to be done before the dock and its appurtenances are ready for use, we feel it necessary to draw the attention of the board to the facts affecting the progress of the works and our position in relation thereto.

“It is not necessary for us in this communication to enumerate in detail the several alterations which you have found it expedient to make in the details of the work, nor the times at which the orders for such alterations have been given. Suffice it to say that in no one particular has the work been executed in accordance with the contract drawings.

“These alterations have not merely increased the costs to us, and in many cases rendered the prices contained in the schedule inapplicable, but the delays which from time to time have occurred before you found yourself in a position to give us definite instructions as to how the several works were to be carried out has been such that time has long ceased to be of the essence of the contract, and we are quite aware that we are no longer bound to complete within any particular period.

“We may remind you that the delay enforced upon us in more than one most important work has extended over

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twelve months; and, as instances both of alterations and delays, we will mention what occurred during the month of September last. On the first of that month we received an 524] order requiring us to leave certain *spaces in the dock walls for crane foundations, involving, not only considerable alterations in the walls, but the taking down of portions already built and the removal of our cranes before the work is completed, thus involving the replacing of them at considerable expense to us.

"On the 12th of September we received a drawing for the invert to the river entrance differing materially from the contract.

"On the 23d we received a drawing of the river entrance which rendered it necessary for us to set back the walls to the extent of 3 feet to 3 feet 10 inches all round, the foundations for which walls were already excavated.

"This obliged us to alter the position of our steam gantry, which was then in course of erection.

"Of course these delays and alterations not only increase the cost of the work to us by the greater length of time during which our superintendents and plant are employed, but the great rise in wages and the cost of materials have been most serious in their effects. We have no doubt that under these circumstances we are entitled to compensation for all losses arising from these delays, and that this is not a question for your adjudication under the contract. We have, however, no desire (nor do we suppose that you or the directors have) to take any hostile proceedings; on the contrary, we are anxious to complete the works in a manner and in terms which will be just to ourselves and satisfactory to the board; and as we assume that you must now be in a position to furnish complete plans for the remainder of the work which will not require any further modification, we suggest that you shall furnish such plans and instructions without delay, and that a supplemental contract shall be entered into for the completion of the whole within a time to be named, for a sum which shall cover all our claims for extra work, alterations, damages for delays, and other claims.

"In the meantime, we will proceed with the work as rapidly as circumstance will admit, but it must be without prejudice to any of our claims. And you must be good enough to understand that we cannot consider ourselves bound to execute any of the altered work at the prices named in the schedule, or to complete any of the works without compensation for the loss consequent on the delay,

*whether direct or indirect, and until we can arrange [525 terms for the completion, we shall require monthly payments to cover costs out of pocket, including a sum to reimburse us for the use of plant, together with 10 per cent. for profit. We trust you will bring this before the board at your earliest convenience.

Yours truly,

(Signed) "T. & C. WALKER.

"William Baker, Esq."

On the same 16th of October, 1873, a meeting of a committee of directors of the defendant company, called "the works committee," was held in London. It was attended by the plaintiff, Thomas Andrew Walker, and Mr. Baker. The plaintiff's letter of that date was read by Mr. Baker to the committee. Mr. Baker complained of want of progress in the execution of the works. The directors said they knew the plaintiffs were entitled to consideration, and offered to allow a year for the completion of the works, and to pay the plaintiffs £5,000 in addition to increased prices to be fixed by Mr. Baker for the additional and extra works. This offer was left open, and it was arranged that Mr. Baker should meet Mr. Walker at Garston and try to settle the prices to be paid to the plaintiffs for additional and extra works, after which another meeting of the works committee was to be holden.

On the 4th of November, 1873, Mr. Baker met Mr. Thomas Andrew Walker at Garston.

They went into various calculations, with the view of an adjustment by Mr. Baker of a new schedule of prices, and at parting Mr. Baker said there would not be much difference between them.

The works for which plans had been delivered were then progressing rapidly, and Mr. Walker did not understand Mr. Baker as expressing dissatisfaction at the rate of progress, but Mr. Baker did ask Mr. Walker to put more men on. The works committee met again on the 21st of November, 1873. Mr. Walker and Mr. Baker were both present. The committee asked Mr. Walker to state the lowest terms he would agree to. He named £10,000. as the sum to be paid instead of the £5,000 offered on the 16th of *Oc- [526 tober, and proposed that the time for completion of the works should be extended to the 31st of December, 1874, also that certain alterations should be made in some parts of the works designed by Mr. Baker, and that a new schedule of prices should be framed for all the extra and additional works. No agreement was come to at that meeting.

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On the 13th of January, 1874, Mr. Cope (a member of the firm of Cope, Rose and Pearson, solicitors, who had been consulted by the plaintiffs as to the proposed new agreement, and who were also the solicitors for Mr. Waring, one of the plaintiffs' sureties) had two interviews with Mr. Baker, the result of which was that he wrote and sent to Mr. Roberts, the defendants' solicitor, a letter, of which the following is a copy :

"26 Great George Street, Westminster, S. W.

"13th January, 1874.

"Garston Dock and T. & C. Walker.

"Dear Sir,

"I have had an interview on behalf of Messrs. Walker with Mr. Baker in reference to his letters to them respecting their delay in returning the draft supplemental agreement in connection with their contract for the Garston Dock, which was sent for their perusal some time ago, and he has suggested that I should make my communication to you, and that you will be good enough to lay it before him for his consideration, and that of the committee of works, which, it appears, meets to-morrow morning. The reason Messrs. Walker have been so long in communicating with Mr. Baker on the subject is simply this, that they have not seen their way to obtaining the use of sufficient capital to enable them to make that progress with the works which the supplemental agreement contemplates. Having several large works in hand, all of which have been great drains on their resources, they find that, unless they could command a further amount in the shape of capital of from ten to fifteen thousand pounds, it would be impracticable for them to finish the works by the time the board require; or indeed to make any more expeditious progress with them than (due regard being always had to the impediments put in their way, as detailed in their letter to Mr. Baker of October last), would insure their completion within what, under 527] these circumstances, *may be considered a reasonable period. They have made every effort to obtain the money they require without success, and an appeal they have made to Messrs. Waring for this farther assistance has been refused.

"In this state of things, though quite willing to go on with the contract at as fast a rate as their finances will enable them to do, and sufficiently so as they are advised to keep them within the spirit of the contract, they yet feel reluctant to stand in the way of the company's attaining

their object of an earlier completion, such as the new agreement contemplates, and they would be willing that other parties should come in and complete the contract in place of themselves, if a satisfactory arrangement can be come to to that effect.

"With a view of facilitating such a solution of the present difficulty, I have, after seeing Messrs. Waring, made Mr. Baker a communication from that firm which he will no doubt lay before the committee to-morrow. I shall be very glad if the result is to relieve the Messrs. Walker of the contract, which is apparently too burdensome for them, and at the same time to secure the company the more expeditious completion of the works which they appear to require.

"I remain, dear sir, yours faithfully,

"J. A. M. COPE.

"R. T. Roberts, Esq.,

"Solicitor, Euston Station."

Mr. Cope wrote the letter in the hope that it would lead to an arrangement, which he believed would be for the benefit both of the plaintiffs and their sureties; but he had no express authority from the plaintiffs, or either of them, to write the letter of the 13th of January, 1874, or to see Mr. Baker on the subject of the contract, and the plaintiffs did not know of the contents of the letter till after service of the notice of the 22d of January, 1874, hereinafter mentioned.

On the 22d of January the defendants caused the plaintiffs to be served with the following notice:

"To Messrs. Thomas Andrew Walker and Charles Walker, of *9 Victoria Chambers, in the city of Westminster, trading under the style or firm of T. & C. Walker. [528

"Whereas by an agreement dated the 17th day of May, 1871, made between Thomas Andrew Walker and Charles Walker therein and hereinafter designated as the said contractors of the one part, and the London and North Western Railway Company therein and hereinafter designated as the said company of the other part, for the consideration therein appearing, the said contractors covenanted and agreed with the said company to execute the works required for constructing and completing a new dock and channel, and works in connection therewith, at Garston near Liverpool, as the same were set forth and described in the specification, bill of quantities, schedule of prices, and plans in the said agreement referred to, and covenanted and agreed to observe and perform all the covenants and provisions set

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out in such specification, and that all the powers, rights and privileges mentioned therein, and conferred thereby in respect of such work, should and might be exercised according to the true intent and meaning thereof; and whereas by the said agreement it was provided that if the said contractors should not complete the said works within the period limited for that purpose; or if from any cause whatever (not arising from any act or acts done, or omitted to be done, by the said company contrary to the true intent of the said agreement), they should be prevented from or delayed in proceeding with the completion of the said works according to the said specification, it should be lawful for the said company, without any previous notice being given to the said contractors, to take the said works entirely or in part out of their or his hands, and to employ any other contractor or contractors, workman or workmen, either by contract, or by measure, or value, or otherwise proceed with the said works, and complete the same, and that in such case the said contractors should only be entitled to receive such sums as shall have actually accrued due at the time of the works being taken out of their hands, and all the expenses incurred by so doing shall be deducted and retained from the money due to the original contractor, or shall be recoverable as liquidated damages by action at law [529] or otherwise; and whereas by the said *specification it was also agreed that, should the engineer be at any time dissatisfied with the nature or mode of proceeding with, or at the rate of progress or maintenance of the works, or any part thereof, he shall have full power to procure and make use of all the labor and materials which he may deem necessary, deducting the cost of such labor and materials from the money that may be then due, or that may become due to the contractor. But it was expressly declared that the possession of this power by the engineer should not in any degree relieve the contractor from his obligation to proceed in the execution of and to complete the works with the requisite expedition, or to maintain them as hereinafter mentioned, and it was provided that, should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works as hereinafter mentioned to the satisfaction of the engineer, his contract should, at the option of the company, but not otherwise, be considered void as far as relates to the works or maintenance remaining to be done, and all sums of money that might be due to the contractor, together with all materials and implements in his posses-

sion, and all sums of money named as penalties for the non-fulfilment of the contract, should be forfeited to the company, and the amount should be considered as ascertained damages for breach of contract; and whereas the said contractors have not completed the said works within the period limited for that purpose, and have not been prevented or delayed from proceeding with the completion of the said works according to the said specification by any act or acts done or omitted to be done by the said company, but great delay has occurred in the completion of the same, and whereas the engineer mentioned in the said specification is dissatisfied with the nature or mode of proceeding with and at the rate of progress of the works, and the contractors have failed to proceed in the execution of the works in the manner and at the rate of progress required by the said engineer. Now the said company do hereby give the said Thomas Andrew Walker and the said Charles Walker, the said contractors, and each of you, notice that they will at the expiration of one week from the date hereof, take the said works entirely out of your hands and will, if [530 need be, employ other contractor or contractors, workman or workmen, to proceed with the said works and complete the same, and also that the said engineer on their behalf will procure and make use of such labor and materials which he may deem necessary, deducting the cost thereof, as in the agreement provided. And the said company give you further notice that the said contract shall be considered void as far as relates to the works or maintenance remaining to be done, and that the sums of money, materials, implements and penalties hereinbefore mentioned shall be and hereby are forfeited to the said company.

"Dated the 22d day of January, in the year of our Lord, 1874.

"Signed on behalf of the said company by

"S. REAY, Secretary."

The question which arises upon this notice is, whether, upon the facts and under the circumstances stated, the notice was valid and sufficient to avoid the contract, so far as related to the works or maintenance remaining to be done, and to cause to be forfeited to the defendants all sums of money due to the plaintiffs, together with all materials and implements in their possession, and all sums of money named as penalties for the non-fulfilment of the said contract, or whether the notice was valid and effectual for any, and if so, which of such purposes.

There is only one clause in the contract which confers any right to avoid it and forfeit the money due to the contractor, with the materials and implements and the sums named as penalties for non-fulfilment of the contract, and the question is, whether the plaintiffs were entitled at the date of this notice to avail themselves of that clause. A good deal of argument was expended on the question whether or not the engineer, within the meaning of the clause, was dissatisfied with the rate of progress or the manner in which the contractors were proceeding, and whether there must not be a requisition in writing or notice of dissatisfaction before proceeding to enforce it, but in the opinion at which we have arrived it is unnecessary to reconsider or decide these points. The object of the clause appears to us to be that the engineer may have the means of requiring the works to 531] be proceeded with *in such a manner and at such a rate of progress as to insure their completion at the time stipulated. If not completed within the time limited, there is another set of clauses applicable, both in the agreement and in the specification, which enables the company to make use of all labor and materials from the money then due or to become due to the contractor, and to take the works entirely or in part out of the contractor's hands, and to employ any other workmen, either by contract or measure and value, or otherwise, and to proceed with the works and complete the same, the contractors in such case only being entitled to receive such sums as shall have actually accrued due at the time of the work being taken out of their hands, all expenses incurred by so doing being deducted and retained from the money due to the original contractor or being recoverable as liquidated damages by action at law or otherwise.

There is no doubt that, as the engineer has power by the contract to vary or alter the works, the contractor must execute them with any variations made, and that he has bound himself to have them completed by the 31st of August, 1873.

There is no provision in the contract for any extension of the time, and therefore, though his contract may involve an impossibility, the contractor is bound to perform it or make compensation in damages: *Jones v. St. John's College* ('). But the question as to the meaning of the clause remains.

In *Roberts v. Bury Improvement Commissioners* (*), in which there was a clause somewhat similar, the defendants

(') Law Rep., 6 Q. B., 115.

(*) Law Rep., 4 C. P., 755.

had given notice to determine the contract and take possession of the works.

Delay was in part occasioned by the act of the board in ordering extra works and otherwise, and it was held that the board were, notwithstanding, entitled to determine the contract and take possession of the works, but there it was assumed that the clause had been put in force before the time originally specified for completion had arrived and before any extension of time had been given.

The clause in our opinion can only be acted on and enforced within the time fixed for the completion of the works, for time is clearly of the essence of the contract, and it is only with reference to the time so agreed that the rate of progress can be determined. If, *as has happened, [532 the time has been exceeded, there may be a new contract to complete in a reasonable time; but to give the clause in question any application to a reasonable time after the time originally fixed has expired, would be, without any express provision, to make the company judge in their own case of what was a reasonable time, and to enable them in their own favor to avail themselves of a most stringent and penal clause.

The remaining clauses, which are clearly applicable after the time of completion has expired, are stringent enough, assuming the company not to have insisted on the strict performance of the contract. Here there was a disregard of the time of completion by mutual consent, and a negotiation was on foot for allowing a longer time and enhanced prices to the contractor, but we do not decide the case on that ground, but upon what we consider to be the legal construction of the clause, which could only be enforced before the time originally fixed for completion of the work had expired, and we therefore think the notice of the 22d of January, 1874, was not effectual for all or any of the purposes mentioned in the question put to us, and that the contract was not avoided. We think the defendants were not justified in point of law in taking possession of the plaintiffs' implements and materials.

Our judgment must therefore be for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Kendall & Congreve.*

Solicitor for defendants: *Roberts.*

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See 1 Eng. R., 532-4 note; 16 Eng. Rep., 324 note.

Where by the terms of a contract the contractor is not entitled to receive payment for any portion of the work until the same shall be fully completed according to the terms of the agreement, and such completion duly certified by the inspectors employed on the work, unless the plaintiff produces on the trial the certificate of the inspectors provided for in the contract, or satisfactorily accounts for or excuses its production, he cannot recover.

Canada, Upper: Coatsworth v. Toronto, 7 C. Pl., 490; 8 id., 364; Oldershaw v. Garner, 38 Q. B., 37; Aitchison v. Cook, 37 Q. B., 490; Ekins v. Bruce, 30 Q. B., 48; Macklem v. Thorn, 30 Q. B., 465.

See Lake v. Cameron, 18 Q. B., 622; McGennis v. Yorkville, 21 Q. B., 163; Melville v. Carpenter, 4 C. P., 159.

Delaware: Randel v. Chesapeake, etc., 1 Harrington, 233.

Illinois: Coehy v. Lehman, 79 Ill., 173; Snell v. Brown, 71 Ill., 133.

Indiana: In this state a party who has performed work for another under a special contract may recover therefor, though not performed at the time or in the manner stipulated, if the work done be accepted by the other party. The recovery is limited to the amount the party is benefited. In this state the contractor who has performed work, payable on production of such certificate, may recover without it: Adams v. Cosby, 48 Ind., 153. This case affirms S. C., 1 Wils. Superior Ct. Rep., 342, holding the contrary. It is somewhat difficult to understand just what will be held to be the rule in Indiana, though we understand the affirmation to be on the ground that conceding the law to be as laid down by the *supreme court*, the jury had found the *facts* against the plaintiff.

Irish: Is not necessary: Mansfield v. Dorlin, Irish Law Rep., 4 C. L., 17; Murphy v. Bower, Irish L. R., 2 C. L., 506.

Minnesota: Johnson v. Howard, 20 Minn., 370.

New York: Schencke v. Rowell, 3 Abb. New Cases, 42; Guidet v. Mayor, 36 N. Y. Superior Ct. Rep., 557; Smith v. Wright, 6 Thomp. & Cooke, 694.

An allegation that an architect's certificate is "unreasonably" withheld is

not a sufficient justification for not producing it: Schencke v. Rowell, 3 Abb. New Cases, 42.

United States: U. S. v. Robison, 9 Peters, 326; Case v. U. S., 11 Court Claims Rep., 712.

Wisconsin: Bannister v. Patty, 35 Wisc., 215.

In such case it is the duty of the employer to keep inspectors on the work, and when it is fully completed according to the contract, to cause the inspectors, on the application of the contractor, to furnish him such certificate. If there be any unreasonable or obstinate, collusive, fraudulent refusal on the part of the employer to perform this portion of the contract, such refusal would constitute an excuse for the non-production of the certificate: Bigelow on Fraud, 163.

Canada, Upper: See Great Western, etc., v. Des Jardins, 9 Grant's Chy., 503.

Connecticut: Durand v. New Haven, etc., 42 Conn., 211.

Delaware: Randel v. Ches., etc., 1 Harrington, 233.

Minnesota: Starkey v. De Graffe, 22 Minn., 421.

New York: Guidet v. Mayor, 36 N. Y. Superior Court R., 557; Schencke v. Rowell, 3 Abb. N. C., 42.

Wisconsin: Bannister v. Patty, 35 Wisc., 215; Hudson v. McCartney, 33 Wisc., 215.

An agreement on the part of A. to pay B. every fortnight for the work which A.'s engineer shall certify to have been done by B., is a *covenant* on the part of A. that the engineer shall make the certificate: Randel v. Chesapeake, etc., 1 Harrington, Del., 233.

Where the contract provides for the skill and judgment of the engineer of a company the party is not concluded by the measurements, and calculations, of an assistant: Snell v. Brown, 71 Ill., 133.

In determining whether a refusal to obtain the requisite certificate was unreasonable, and if so, whether the contractor is excused from obtaining it, the interference of a third party cannot be considered but only the circumstances of the contract, and the objects sought to be accomplished by the condition; in contemplation of law the certificate ought to have been given

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when the contract was beyond all question fully completed, and a refusal to give it because of an injunction at the suit of a third party is unreasonable, and the contractor is entitled to recover without its production: *Bowery, etc., v. Mayor*, 68 N. Y., 336, reversing 3 Hun, 639.

So the parties may provide that any loss or damages to either party from unnecessary delay or failure to perform the contract to the satisfaction of a particular person shall be ascertained by him, and that his finding shall be binding on all parties when it will be so except in cases of fraud, collusion, mistake or undue influence.

Delaware: *Randel v. Chesapeake, etc.*, 1 Harrington, 233.

Illinois: *Taylor v. Renn*, 79 Ills. 181.

Kansas: *Board, etc., v. Shaw*, 15 Kans., 33.

United States: *Case v. U. S.*, 11 Court Claims Rep., 712.

Wisconsin: *Scott v. Whitney*, 41 Wisc., 504; *Bannister v. Patty*, 35 Wisc., 215.

In such case, if the agreement provide that "the amount so found shall be deducted from the next regular payment or payments," all claims for the deduction of damages must be determined by the person designated, from time to time, as the work progresses; such claim cannot be made for the first time and the amount thereof determined in the lump, after the work is finished and after a suit to recover the unpaid balance: *Bannister v. Patty*, 35 Wisc., 215.

See *Great Western v. Des Jardins*, 9 Grant's (U.C.) Chy., 503.

So a clause in a policy of life insurance that the company would pay the amount insured for, if in the opinion of their surgeon in chief the party did not die of intemperance, is a condition precedent to the right of the plaintiff to recover, and on the trial the plaintiff must prove the decision of the surgeon, or account for its absence, as part of his case: *Campbell v. American Popular*, 1 MacArthur, 247; *Id.*, 471.

If, however, the surgeon be also a stockholder whose dividends are affected by the payment of claims, and the fact of such interest was concealed by the company from the party insuring

at the time the policy was made and accepted, it is a sufficient excuse for the non-performance of such condition: *Campbell v. Am. Pop.*, 1 MacArthur, 471, 4 Ins. Law Jour., 106.

The signification of dissatisfaction by the architect or engineer need not be in writing unless stipulated for: *Oldershaw v. Garner*, 38 Upper Can. Q. B., 37.

The mere fact that the measurements are less than the work actually done, will not justify setting it aside for fraud. The fact that more work was done than is included in the estimate, may be shown as a circumstance tending, in some degree, to establish fraud, but it is not conclusive. The evidence must show that such party knowingly and wilfully disregarded his duty, and rejected or condemned work which he knew, or at least should have known, fully conformed, in all respects, to the contract: *Snell v. Brown*, 71 Ills., 133.

Where a contract stipulates that the compensation shall be paid upon the certificate or estimates of an architect, engineer, etc., such certificate or estimate is conclusive upon the parties where an honest discretion has been exercised and no fraud is shown.

Canada, Upper: *De Cew v. Clark*, 19 C. Pl., 155; *Oldershaw v. Garner*, 38 Q. B., 37; *Macklem v. Thorn*, 30 Q. B., 464.

See *Lake v. Cameron*, 18 Q. B., 622.

Iowa: *Mitchell v. Kavanagh*, 38 Iowa, 286.

Irish: In Ireland such determination has been held not to be conclusive: *Mansfield v. Doolin*, Irish L. R., 4 C. L., 17.

Minnesota: *Leighton v. Grant*, 20 Minn., 345.

United States: *Omaha v. Hammond*, 94 U. S. Rep., 98.

The fact that the owner of lands upon which a house is built takes possession of and occupies the building, will not entitle the builder to recover on the common counts without performance: *Oldershaw v. Garner*, 38 Upper Can. Q. B., 37; *Simpson v. Kerr*, 38 U. C. Q. B., 356.

Where the employer delayed the work so the cost of completion was increased, the obtaining of the requisite certificate and the acceptance of payment thereunder precludes the recovery

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ery of damages for the delay, when the contract provides that "such payment is in full of every claim or demand whatever in the premises, except the amount agreed upon for extra work": *Coulter v. Board, etc.*, 63 N. Y., 365.

See also *Case v. U. S.*, 11 Court Claims Rep., 712; *Taylor v. Renn*, 79 Ill., 181.

An architect or engineer has no right to determine the quantity or quality of extra work done outside the contract unless it provide that he shall do so, nor to fix any different measure of compensation than that contracted for: *Starkey v. De Graff*, 22 Minn., 431; *Simpson v. Kerr*, 33 U. C. Q. B., 353; *Hamilton v. Moore*, 33 U. C. Q. B., 100.

Otherwise, when the extra work is also provided for by the contract: *Connor v. Belfast, etc.*, Irish L. R., 5 Com. Law, 55.

A certificate stating the amount and value of the work done *at the contract prices*, but not stating in terms that it is done to the satisfaction of the person so certifying, is in effect a certificate that the work is done to his satisfaction: *Bannister v. Patty*, 35 Wisc., 215.

See also *Case v. U. S.*, 11 Court Claims Rep., 712.

The architect's acceptance of any substitute for that which the contract called for, if substantially variant from its terms, unless by authority of the employer, is not enough to sustain an action; and even the employer's acceptance of inferior or different work must be supported by some new consideration, as, for example, an agreement to accept such inferior work with deductions for defects agreed upon, in order to be deemed as part or entire performance: *Schencke v. Rowell*, 3 Abbott's New Cases, 42.

The parties to such a contract may also waive the performance of any of its stipulations: *Bannister v. Patty*, 35 Wisc., 215; *McPherson v. Rockwell*, 37 Wisc., 159; *Aitchison v. Cook*, 37 U. C. Q. B., 490; *Holbrook v. Satchel*, 114 Mass., 433; *Woodruff v. Hough*, 91 U. S. Rep., 596.

See *Simpson v. Kerr*, 33 U. C. Q. B., 355-7.

Such waiver may be shown by direct evidence, or it may be implied from

the acts of the parties: *Cosby v. Adams*, 1 Wils. (Ind.) Superior Court R., 342.

See *Great Western, etc., v. Des Jardins*, 9 Grant's (U. C.) Chy., 508.

User without objection for a considerable time, or insisting upon the certificate, would be a waiver: *Hamilton v. Myles*, 24 Upper Can. Com. Pl., 309; *Court of Errors, reversing S. C.*, 23 C. Pl., 293.

In the following cases the superintendent of buildings was held to have authority to consent to alterations, and to waive strict performance of a building contract: *Andre v. Hardin*, 32 Mich., 324; *Willey v. School Dist.*, 25 Mich., 419.

As to the effect of monthly approximate estimates by an engineer, see *Case v. U. S.*, 11 Court Claims Rep., 712.

A sub-contractor who has not agreed that the decision of an architect or engineer shall be final upon him may recover of the contractor, upon substantial performance or a waiver by the contractor, although the architect or engineer reject the work: *Woodruff v. Hough*, 91 U. S. Rep., 596.

The contractor may bring suit for the stipulated compensation, immediately on receipt of the certificate, without notice to the employer, if the person giving it be the servant or agent of the employer: *Wilson v. Huron, etc.*, 10 Upper Can. Com. Pl., 498.

Though the engineer or architect refuse to certify from mere wantonness, fraud, or even collusion with the employer, no action lies against him by the contractor for refusing to give the requisite certificate: *Murphy v. Bower*, Irish Law Rep., 2 Com. L., 506.

Where the contract provided that no extras should be permitted or allowed unless agreed upon in writing, and that the writing should be produced before payment therefor, it was held, in Canada, that no recovery could be had for extras without producing such a writing: *Oldershaw v. Garner*, 38 Upper Can. Q. B., 37.

Contrary: *Conner v. Belfast, etc.*, Ir. L. R., 5 C. L., 55.

Where the contract provided that for certain causes the defendant might declare it forfeited, in which case the defendant was to be exonerated from all liability under the same, it was held

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that if the contract was terminated wrongfully or improperly, the contractor was entitled to recover for what he had done, and for his damages for the revocation: *Sanger v. Chicago*, 65 Ill., 506; *Sloan v. Hayden*, 110 Mass., 141; *McAndrews v. Tippet*, 89 N. J. Law, 105.

As to the rights of parties under a contract providing that, in case the contractor failed to proceed rapidly enough to satisfy the engineer, the contract might be revoked and completed by the employer at contractor's expense, see *Geiger v. Western*, etc., 41 Md., 4; *Murphy v. Buckman*, 66 N. Y., 297; *Randel v. Chesapeake*, etc., 1 Harring-

ton, Del., 233; *Savannah*, etc., v. *Callahan*, 56 Geo., 381; *Wells v. Martin*, 82 Mich., 478; *Friedland v. McNeil*, 83 Mich., 40; *Potter v. McPherson*, 61 Mo., 240; *McAndrews v. Tippet*, 89 New Jersey Law, 105; *Waco*, etc., v. *Shirley*, 45 Tex., 355; *Strauss v. R. R.*, 7 West Virginia, 368; *St. Andrews v. Brookfield*, 18 Moore, P. C., 510; *Aspinall v. London*, etc., 11 Hare, 325; *McDonnell v. Canada*, etc., 83 U. C. Q. B., 318.

As to contract for specific damages per day, if building not finished by particular time: *Hamilton v. Moore*, 83 U. C. Q. B., 100; *Id.*, 520; *Simpson v. Kerr*, *Id.*, 845, 848.

C A S E S
DETERMINED BY THE
EXCHEQUER DIVISION
OF THE
HIGH COURT OF JUSTICE;
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE EXCHEQUER DIVISION,
AND BY THE
DIVISIONAL COURTS OF APPEAL
FROM
INFERIOR COURTS,
XXXIX VICTORIA.

[1 Exchequer Division, 251.]

Feb. 26, 1876.

251] *ALLEN V. THE NEW GAS COMPANY.

Master and Servant—Negligence—Foreman and Fellow servant.

The defendants had on their premises gates which were safe when open and wedged up, but liable to fall when closed. The attention of the manager had been directed to the unsafe condition of the gates, and orders had been given, but not carried out, to remedy this. The plaintiff, a workman in the employ of the defendants, passed through the gates when open, but on his return one of them was closed, and shortly afterwards, while he was working near the gates, they fell on and injured him. There was no evidence to show how this happened, nor any evidence that the manager and other persons employed by the defendants were incompetent:

Held, that the defendants were not liable, as the plaintiff had not shown that the persons employed by the defendants were incompetent, and the negligence, if any, which caused the accident was that of a fellow workman of the plaintiff.

THIS was an action to recover damages for injuries sustained by the plaintiff through the alleged negligence of the

defendants. At the trial before Huddleston, B., in Middlesex, at the sittings after Trinity Term, 1875, a verdict passed for the plaintiff, with leave to the defendants to move to set it aside and enter a nonsuit, or a verdict for them, on the grounds that there was no evidence of negligence on their part to render them liable; that the plaintiff was guilty of contributory negligence; and that the plaintiff was aware of the danger, and voluntarily undertook the risk.

The defendants were a joint stock company engaged in the manufacture of gas, and the plaintiff, who was a servant in their employ sustained injury by some gates on the defendants' premises falling on him. The evidence was, that these gates, if left open and wedged up, were safe; but if closed, or partially closed, there was danger that they might fall. On the day of the accident the plaintiff passed through the gates when they were open and wedged up, but on his return, some time afterwards, one of the gates was closed, and while in this condition they fell on and injured him as he was at work near them.

The other facts and the evidence are set out below in the judgment of the court.

Jan. 21. A rule *nisi* having been obtained pursuant to the leave reserved,

**J. O. Griffiths*, Q.C., and *W. G. Harrison*, showed [252 cause: The verdict was right, on the ground that it was the duty of the defendants to employ a competent person to take charge of their premises. Further, the plaintiff had remained in the employment under a reasonable expectation that the gates would be rendered safe, and therefore the defendants were liable: *Holmes v. Worthington* (') and *Holmes v. Clarke* (').

Day, Q.C., and *W. Graham*, in support of the rule: The danger in this case did not arise from the inherent condition of the gates, and there is nothing in the case to take it out of the rule, that to make the master liable, he should know, and the servant be ignorant, of the danger. In *Holmes v. Clarke* (') there was a statutory duty on the defendants to fence the machinery. Here the negligence, if any, which caused the accident must have been that of one of the fellow workmen closing the gates; or, if it is said to be that of the foreman, he is the fellow servant of the plaintiff: *Howells v. Landore Siemens Steel Co.* ('); *Feltham v. England* ('). The defendants cannot personally superintend, the plaintiff

(1) 2 F. & F., 538.

(2) 6 H. & N., 349; 7 H. & N., 987;

30 L. J. (Ex.), 135; 31 L. J. (Ex.), 356.

(3) Law Rep., 10 Q. B., 62.

(4) Law Rep., 2 Q. B., 83.

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must therefore, to make them liable, show that the persons employed by them were incompetent: *Wilson v. Merry* (').

Cur. adv. vult.

Feb. 26. The judgment of the court (Bramwell, Amphlett and Huddleston, BB.) was read by

HUDDLESTON, B.: This was a rule to set aside a verdict for the plaintiff for £150, and enter a nonsuit or a verdict for the defendants, "on the ground that there was no evidence of negligence on the part of the defendants to render them liable."

There were other grounds on which the rule was argued, but which, in consequence of the view we take, it does not become necessary for us to consider.

The plaintiff was a servant, at weekly wages, to the defendants, *who were a joint stock company, limited, for the manufacture and sale of gas, and the injuries he complained of were caused by the falling of some gates upon him. The evidence applicable to this part of the case was that these gates were built into a framework on the premises of the defendants where the plaintiff was at work. They had been out of repair for some time, and had been gradually getting "from bad to worse." If closed, or partially closed, they were unsafe; but if left open, and wedged up, they were safe. On the day of the accident, the plaintiff and another man, who were in the employment of the company, had gone through the gates with coke for the purpose of stoking the furnaces before breakfast, and the gates were then open, and wedged up; but on the plaintiff's return from breakfast, one gate was open and the other was shut. How this occurred was not shown. The plaintiff attributed it to the effect of the wind; another witness thought that it could not be the wind, but that somebody must have moved them; but there was no evidence to show that any one had touched the gates in the meantime.

While the plaintiff was preparing to set about his work, being on the defendants' premises and within a few feet of the gates, they suddenly fell upon him. The attention of a person of the name of Farren, who was described as the company's manager, had been called to the unsafe condition of the gates a considerable time before the accident, and he had promised to have them seen to. It was not shown that he had not fulfilled his promise, but directions had been given by the foreman of the blacksmiths to one of his men to make a bar to go across the gates. That had not been done, because, as the witness said, there was not the right

(') Law Rep., 1 H., L. Sc., 323.

size of iron on the premises to make the bar. After the accident the gates were put up, and such an iron bar was placed across them to prevent them from falling. At the trial the verdict was entered for the plaintiff, with leave to the defendants to move to enter a nonsuit or verdict for the defendants, the court to draw inferences. It was urged on the part of the defendants that there was no evidence to fix them with negligence, and *Wilson v. Merry* (1) was relied on.

*We think that the mischief in this case arose from [254 the conduct of the plaintiff's fellow workmen as such, and not from the defendants' default, nor from the default of any manager or vice-proprietor, and that, therefore, the defendants are not liable. The gates were dangerous when shut, not dangerous when against the wall and wedged up. Now, either some workmen, as such, moved the gates, or the wind did so, and then the workmen ought to have replaced them. It was therefore by the improper moving of the gates by a workman, or by their being improperly left open by the workmen, that the mischief happened. The case is like this,—there is an unsafe ladder, it is shut up and not used, a workman takes it out and does not replace it, and then another workman uses it and is hurt; the master would not be liable. If there be any distinction between this case and the case in the House of Lords we prefer that it should be drawn by the Court of Appeal. But, further, the authorities referred to establish the principle that in the event of the master not personally superintending and directing the work his sole duty is to select proper and competent persons to do so, and to furnish them with adequate materials and suitable means and resources for accomplishing the work. This was fully explained by the present Lord Chancellor in *Wilson v. Merry* (1), and Lord Colonsay in his judgment (2) points out what duties may be incumbent on masters with reference to the safety of their laborers, on the fulfilment of which the laborers are entitled to rely, and for the failure in which the master may be responsible.

To establish, therefore, negligence against the defendants, the plaintiff must prove that the defendants undertook personally to superintend and direct the works, or that the persons employed by them were not proper and competent persons, or that the materials were inadequate, or the means and resources were unsuitable to accomplish the work. The onus is upon him, and failing to do so he fails to establish negligence. This is clearly pointed out by Lord Cranworth in *Bartonshill Coal Company v. Reid* (3): "Where an in-

(1) Law Rep., 1 H. L. Sc., 326.

(2) At p. 344.

(3) 3 Macq., at p. 282.

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jury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences 255] any *person other than him who actually caused the damage, it lies on the person injured to show that the circumstances were such as to make some other person responsible": and by Mr. Justice Willes in *Lovegrove v. London and Brighton Ry. Co.* ('): "It is not enough for the plaintiff to show that he has sustained an injury under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation;" as, also, by Erle, C.J., in *Cotton v. Wood* ('). *Feltham v. England* (') is to the same effect. Here there was no evidence that the defendants undertook personally to superintend and direct the works; on the contrary, from the fact of their being a joint stock company, the direct inference would be the other way; nor that Farren, whatever may have been his position, which is not clearly defined, was either an incompetent or an improper person. It may be doubted whether the falling of the gates can be attributed to the negligence or carelessness of Farren, as some orders, probably emanating from him, seem to have been given by somebody as to the repair of the gates.

But assuming it to have been the negligence of Farren, his negligence would, as before pointed out, be that of a fellow servant; for which, according to the cases cited, the defendants would not be liable. There was no evidence of the incompetency of any other servant whose duty it must have been to have seen that the gates were put into a state of repair.

The evidence as to the want of sufficient materials pointed only to the absence of a proper size of iron to make the bar. We doubt very much whether the providing a proper iron bar would have done more than have secured the gates properly when closed. At all events, we cannot infer that in a company such as the defendants there was not a person whose duty it was to see that there was a proper supply of iron, and if there was such a person, his negligence would not affect the defendants unless he were incompetent, and of that there was no evidence.

256] *By suitable means and resources, we think must be meant all that was necessary to carry on the business, including premises reasonably safe for that purpose, as, for

(') 16 C. B. (N.S.), at p. 692; 33 L. J. (C.P.), 329.

(*) 8 C. B. (N.S.), 568; 29 L. J. (C.P.), 333.

(*) Law Rep., 2 Q. B., 33.

instance, in case of a mine, of a proper system of ventilation as pointed out by Lord Colonsay in *Wilson v. Merry* ('); but there was no evidence to show that the premises of the defendants were dangerous, that these gates were defective in their original construction, or that they had not been perfectly safe when first put up. If they had fallen into a state of decay, and had been permitted to remain in that state, it could scarcely be said that that was the act of the defendants, but must have been that of the persons whom they must have employed, and there was no evidence to show that such persons were not proper and competent for the defendants to employ.

Applying, therefore, the principles referred to, we think the plaintiff has failed to satisfy us that the defendants undertook personally to superintend and direct the works, or to select proper and competent persons to do so, or to furnish them with adequate materials or suitable means and resources for the work, and that therefore the rule must be made absolute to enter a nonsuit or verdict for the defendants.

Rule absolute.

Solicitor for plaintiff: *W. Scott Fox.*

Solicitors for defendants: *Hargrove, Fowler & Blunt.*

(') Law Rep., 1 H. L., Sc., 326.

[1 Exchequer Division, 257.]

May 16, 1876.

[IN THE COURT OF APPEAL.]

***DAWSON and Others v. LORD OTHO FITZGERALD. [257]**

Arbitration Clause—Construction of Covenants—Covenant to pay Compensation, the Amount to be referred to Arbitration—Collateral and distinct Covenants.

A lessee covenanted with the lessor that he would keep such a number only of hares and rabbits as would do no injury to the crops, and that in case he kept such a number as should injure the crops he would pay a fair and reasonable compensation, the amount of such compensation, in case of difference, to be referred to two arbitrators, or an umpire. The lessor having brought an action for breach of covenant, alleging that the lessee had not kept such a number only of hares and rabbits as would do no injury, but had kept such a number as did injury, and had neglected to pay any compensation:

Held, reversing the judgment of the court below, that upon the true construction of the lease the covenant to refer the amount of compensation was a collateral and distinct covenant, and that the action was maintainable, although there had been no arbitration.

THE first count of the declaration alleged that the plaintiffs demised to the defendant a messuage and lands called West Park, with liberty of shooting, hunting, &c., over certain manors, upon certain terms. The lease itself was

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referred to during the argument, and the covenants material to this case were that the lessee "will at all times during the continuance of the term keep, or cause to be kept or encouraged, such a number only of hares and rabbits upon the manors as will do no injury to the trees, woods, underwoods, and plantations belonging to the lessors or to their growing crops, or to the growing crops of any of their tenants or farmers; and that in case the lessee shall keep or encourage such a number of hares and rabbits upon the manors as shall injure the trees, &c., belonging to the lessors or their growing crops, or the growing crops of any of their tenants or farmers, the lessee will pay to the lessors or their tenants or farmers a fair and reasonable compensation for such injury, the amount of such compensation in case of difference to be referred to the arbitration of two arbitrators, one to be chosen by the lessors and the other by the lessee, the arbitrators, when chosen, to agree upon and nominate 258] an umpire, and the decision of such *arbitrators or umpire to be binding and conclusive on the lessors and the lessee."

The count set out the above covenants down to and including the words "fair and reasonable compensation for such injury," omitting the rest; and then averred that all conditions were performed, &c., yet the defendant did not during his tenancy keep, or cause to be kept or encouraged such a number only of hares and rabbits upon the manors as would do no injury to the trees, &c., belonging to the plaintiffs or to their growing crops, or to the growing crops of any of their tenants or farmers, but kept such a number as did great injury to such trees, &c., and growing crops respectively, and although frequently requested so to do, the defendant would not pay to the plaintiffs or their tenants or farmers, or any of them, a fair and reasonable or any compensation for such injury. The count also contained breaches of other covenants not now in question.

Plea—to so much of the first count as alleged that the defendant kept such a number of hares and rabbits on the manors as did injury to the trees, &c., and growing crops, and would not pay the plaintiffs or their tenants or farmers, or any of them, compensation for such injury—that one of the terms of the said tenancy was, that in case any such injury should be done by the defendant, he, the defendant, would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be chosen by the plaintiffs and the other by the defendant, the

arbitrators, when chosen, to agree upon and nominate an umpire, and the decision of such arbitrators or umpire to be binding and conclusive on the plaintiffs and on the defendant; that a difference arose between the plaintiffs and the defendant as to the amount of the compensation in the declaration claimed, and that no arbitrators had ever been appointed, nor had the defendant been requested by the plaintiffs to appoint an arbitrator, nor had an award ever been made deciding the amount of the compensation according to the terms of the tenancy.

Demurrer to the plea and joinder therein.

On the 22d of November, 1873, the Court of Exchequer *(Kelly, C.B., and Pigott, B., Bramwell, B., dis- [259
senting) held the plea good, and gave judgment for the defendant (*). From this judgment the plaintiffs appealed.

Kingdon, Q.C., and *Arthur Charles*, for the plaintiffs, relied on the reasoning in the judgment of Bramwell, B., in the court below, and cited *Roper v. Lendon* (*) (where the agreement to refer was in similar terms) as an authority in favor of the plaintiffs.

Manisty, Q.C., and *R. E. Turner*, for the defendant: The question is simply one of construction of the terms of the covenant. The declaration sets out the covenant imperfectly and unfairly, and the omission is supplied by the plea. The words used show the intention of the parties that no action should be brought until after arbitration. Such an intention may appear by any form of words; it is not necessary that the recourse to arbitration should (as in *Scott v. Avery* (*)) be in terms expressed to be a condition precedent to the right of action: *Braunstein v. Accidental Death Insurance Co.* (*) The covenant is really to pay such amount of compensation as the arbitrators or umpire shall find to be due, as in *Elliott v. Royal Exchange Assurance Co.* (*).

[JESSEL, M.R.: The declaration alleges a breach of the covenant to keep such a number only of hares and rabbits as would do no injury; and a second breach that the defendant kept such a number as did injury, but paid no compensation. The plea is at all events no answer to the first breach, and on that ground alone the plaintiffs are entitled to judgment, as pointed out by Bramwell, B. (*).]

The whole of the passage in the lease relating to hares and

(1) Law Rep., 9 Ex., 7.

(2) 1 E. & E., 825; 28 L. J. (Q.B.),

260.

(3) 5 H. L. C., 811; 25 L. J. (Ex.),
308.

(4) 1 B. & S., 782; 31 L. J. (Q.B.), 17.

(5) Law Rep., 2 Ex., 237.

(6) Law Rep., 9 Ex., at p. 11.

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rabbits must be read as one covenant, and the count as containing one breach only.

JESSEL, M.R.: The question is, whether the judgment of the majority of the court below is right, or the opinion of 260] Baron *Bramwell, who differed from them. I take the law as settled by the highest authority—the House of Lords—to be this: There are two cases where such a plea as the present is successful: first, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to pursue one of two courses, either to bring an action for not referring, or to apply under s. 11 of the Common Law Procedure Act, 1854, to stay the action till there has been an arbitration, in which case a judge has power to prevent the case going to a jury, if the arbitration can be fairly enforced. A lessee may have entered into two collateral covenants of this kind, relying on the provisions of the Legislature that in cases where an arbitration can go on, it is open to him to apply to a judge to stay the action on proper terms. It is not unreasonable to suppose that the defendant relied on this when he entered into these two collateral covenants, and there is no necessity to read the words otherwise. Properly construed, they are two covenants, and not one. It would be mere repetition to say more after Baron Bramwell's judgment, in which I entirely concur.

LORD COLERIDGE, C.J.: I agree that the decision of the court below should be reversed, and substantially for the reasons given in my Brother Bramwell's judgment, and I do so on the authority of the principles laid down in *Scott v. Avery* (*). The correct view of *Scott v. Avery* (*) is well stated in my Brother Bramwell's judgment in *Elliott v. Royal Exchange Assurance Co.* (*) to be this: "If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a 261] sum of money *shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the

(*) 5 H. L. C., 811; 25 L. J. (Ex.), 308.

(*) Law Rep., 2 Ex., at p. 245.

third person has so assessed the sum. For to say the contrary would be to give the party a different measure or rate of compensation from that for which he has bargained. This is plain common sense, and is what I understand the House of Lords to have decided in *Scott v. Avery*"⁽¹⁾. That passage states clearly two classes, under one or other of which covenants may fall. I think the present case falls under the former class, and not the latter, and that the judgment below ought therefore to be reversed.

POLLOCK, B.: I am of the same opinion. The principle is well laid down by my Brother Bramwell during the argument in *Tredwen v. Holman*⁽²⁾: "If a tenant covenants that he will cultivate the demised land in a husband-like manner, and also covenants that if any dispute shall arise in respect thereof, it shall be referred to arbitration, an action may, nevertheless, be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until he has ascertained them."

Judgment reversed and entered for the plaintiffs.

Solicitor for plaintiffs: *P. A. Hanrott.*

Solicitors for defendant: *Markby, Wilde & Burra.*

⁽¹⁾ 5 H. L. C., 811; 25 L. J. (Ex.), 308.

⁽²⁾ 1 H. & C., at p. 79.

See note to the case of *Edwards v. Aberayron, etc.*, *ante*, p. 287. See also *ante*, p. 416.

[1 Exchequer Division, 265.]

June 16, 1876.

[IN THE COURT OF APPEAL.]

*WOOLER and Wife v. KNOTT.

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Landlord and Tenant—Covenant not to do or permit any Act that can or may affect, lessen, or make void Public house Licences—Conviction of Lessee—Forfeiture—Licensing Acts, 1872 and 1874 (35 & 36 Vict. c. 94, and 37 & 38 Vict. c. 49).

By a lease of a public house made after the Licensing Act, 1874, came into operation, the lessee covenanted not to "do, omit, or permit, or suffer to be done or omitted, any act, matter, or thing whatsoever that can or may affect, lessen, or make void either or any of the licenses for the time being granted to the public house." The lease contained a clause for forfeiture on breach of covenant. The lessee having committed on the same day three offences against the Licensing Acts of 1872 and 1874, was convicted of two of them by justices, who directed, under the act of 1874, s. 13, that the convictions should not be recorded on any of the lessee's licenses. The lessor having brought an action against the lessee to recover possession of the public house on the ground of forfeiture, and for damages for breach of covenant:

Held, affirming the judgment of the Exchequer Division, that the licenses were not "affected" within the meaning of the covenant, and that there was no breach of covenant.

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Wooler v. Knott.

APPEAL from a judgment of the Exchequer Division in favor of the defendant upon demurrer⁽¹⁾.

M. Lloyd, Q.C., and W. Willis, for the plaintiffs, appellants: The judgment of the court below gives no effect to the words "can or may," but reads the covenant as if it 266] were "any act that *affects, lessens, or makes void." Some meaning must be attached to the words "can or may;" they will fairly include that which makes the avoidance of the license imminent, and beyond the power of the lessee to prevent. The lessee committed on the same day three offences against the Licensing Acts, and was convicted of two of them. If the justices had thought proper, they might have directed the two convictions to be recorded on the license, and then convicted her of the third offence—that of being herself drunk in the public house—under s. 12 of the act of 1872; and then the license would have been *ipso facto* void under s. 30 of the act of 1872. When the offences were once committed, nothing that the lessee might do could prevent the avoidance of the license. It entirely depended on the justices. If this is not something "which can or may affect" the license, what application can those words have? The line must be drawn somewhere. If nothing but what "makes void" the license is a breach of the covenant, no meaning is given to "affect" or "lessen." The court below was influenced by the fact that, whereas by the act of 1872, ss. 13 and 24, these two offences must have been indorsed on the license, s. 13 of the act of 1874 left the indorsement to the discretion of the justices. That alteration in the law cannot alter the meaning of this covenant, which is copied verbatim from a former lease of these premises, granted in 1867. This explains the expression "any of the licenses." Under the present law one magistrate's license and one excise license are sufficient. Moreover, s. 55 of the act of 1872 is not repealed, subs. 3 of which requires the particulars of any conviction to be entered in the register of licenses; and by s. 13 of the act of 1874, the justices, before passing sentence, must inspect that register. In granting renewals of licenses (32 & 33 Vict. c. 27, ss. 4-8), the justices may take into account the general conduct of the house; their powers and discretion are expressly reserved by s. 42 of the act of 1872. It is impossible to suppose that two convictions entered on the register would not influence their decision, and so "affect the license." This license was, at all events, "lessened," i.e., diminished, in value.

(1) 1 Exch. Div., 124, where the pleadings are set out.

[For the rest of their argument, it is sufficient to refer to pp. 126-7, *ante*.]

Cave, Q. C., and *J. C. Heath*, for the defendant, were not heard.

*JAMES, L.J.: I think the Exchequer Division put [267 the true construction on this covenant. It has been argued here, as it was below, that the covenant is equivalent to a covenant that the lessee will not commit any offence against the Licensing Acts. If the parties had intended that, it would have been easy to say, "The lessee shall not commit any offence against the laws for the time being in force concerning public houses," or some such words. No such words are used, but instead the parties put in words which regard the forfeiture of the license itself. The committing of an offence which, under certain circumstances—i.e., if followed by a conviction, and that a recorded conviction, and again by a second recorded conviction and by a third conviction—will result in the loss of the license, is not an act which "may or can affect, lessen, or make void" the license. It is not to be presumed that a person is going to commit other offences. It would be straining words to say that an inchoate act, which may influence the mind of the justices on some future occasion and induce them to order a conviction to be recorded, is of itself an act which affects, lessens, or makes void the license. A conviction does not by itself affect the lessor's interest. If the lessor thinks fit, he can express in plain words that an offence or a conviction shall cause a forfeiture of the lease.

MELLISH, L.J.: I am of the same opinion. If the justices had ordered the two convictions to be indorsed on the license, I think the license would have been affected within the meaning of the clause, because if the tenant was convicted of another offence the license would necessarily be forfeited, and the landlord would run the risk of its never being renewed. Whether the license would have been "affected" if one conviction only had been indorsed on it, so as to require a second conviction to be indorsed and a third conviction to happen before the license could be forfeited, I have some doubt, and I give no opinion. But I am clear that if no conviction has been recorded on the license nothing has been done which "can or may affect, lessen, or make void the license." It cannot be meant that every offence of which a person may be convicted, and which may be indorsed upon the conviction, should work a forfeiture of the lease. The covenant is not simply that *the lessee will not himself do or omit any act, but [268

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that he will not permit or suffer to be done any act by other persons.

As to the other argument, that the tenant having been convicted the covenant is broken, because the license is in danger of not being renewed, this is a covenant that the tenant will not do anything—not to affect a renewal, but—to affect the existing licenses.

BAGGALLAY, J.A.: I am of the same opinion. It is impossible to say that any conviction not indorsed on the license can affect the license. Nothing could have been easier than to say that any conviction should of itself work a forfeiture of the lease, if that result had been intended.

QUAIN, J.: I quite concur that nothing has been done which could or might affect the license. What was done affected the character of the licensed person, not the license itself. This is a covenant intended to protect the interest of the landlord in licensed premises to let or dispose of. There being no indorsement on the license it is as good and valid as if the tenant had never been convicted. It is not void, and stands utterly unaffected. If it had been indorsed with even one conviction, I think a serious question would have arisen whether the license itself was affected, but since it has not, it is in the same position as if there had been no conviction.

To the argument that the license is affected because it is not so likely to be renewed, the answer is complete. The covenant says nothing about renewal, but touches only “any of the licenses for the time being granted.”

Judgment for the defendant affirmed.

Solicitor for plaintiffs: O. B. Wooler.

Solicitors for defendant: Iliffe & Co., for Barron, Dartington.

As to what breaches of conditions not to assign, underlet, etc., will forfeit lease, and what not, see 12 Eng. Rep., 416 note; Gerard's Titles to Real Estate (2d ed.), 184-191; Crawley v. Price, 13 Eng. Rep., 248; Smith & Soden's Landlord and Tenant, 124, 142; Taylor's Landlord and Tenant, § 402 et seq.; 7 Am. Law Rev., 240-263; 1 Smith's Lead. Cas. (7th Am. ed.), 102; Smith's Real and Per. Prop., (Am. ed.), marg., pp. 54, 63, 527, 539; Williams on Real Property (4th Am. ed.), 381; Willard on Real Est., 107.

Where a lease contained a condition that the lessee should not “let or un-

derlet the whole or any part of the demised premises without the written consent of the landlord, under the penalty of forfeiture and damages,” it was held that an assignment of the whole interest of the lessee was not a breach thereof: Lynde v. Newcomb, 27 Barb., 415; Field v. Mills, 33 N. J. Law Rep., 254.

The giving of a mortgage upon lands demised is not a breach of a covenant not to assign, transfer, or set over the lease or the term thereby created: Riggs v. Pursell, 66 N. Y., 193, 199, 200.

So such a covenant is not violated by

the delivery of the lease as a security for money loaned, though such delivery operate as an equitable mortgage of the term created by the lease: *Riggs v. Pursell*, 66 N. Y., 200; *Smith & Soden's Land. and Tenant*, 143; 1 Wash. Real Estate (4th ed.), 479.

And see *Garnsey v. Rogers*, 47 N. Y., 233.

It seems to be held, upon authority, that if the lessee under a lease upon condition that it shall be void if he assign, his representative may sell and assign it, for he is not included within the terms of the condition: *Lee v. Lorsh*, 37 Upper Can. Q. B., 272, citing *Woodfall's Landlord and Tenant* 10th ed.), 548; *Smith's Real and Pers. Property* (4th ed.), 694; *Shep. Touch.*, 144; 2 *Williams on Executors* (6th Am. ed.), 941 bottom paging, 1008 top paging; 3 id., 1750 bottom paging, 1851 top paging, note (1).

But see if words be "lessee or assigns," shall not alien: *Williams v. Earle*, Law R., 3 Q. B., 789; *West v. Dorr*, L. R., 4 Q. B., 637; 5 id., 464; *Lee v. Lorsh*, 37 Upper Can. Q. B., 280.

A lessee, holding under a lease containing a clause against sub-letting, sublet a portion of the premises to the plaintiff as tenant from year to year; the *same* lessor having died, the defendant trespassed on the plaintiff's part of the premises; held, in trespass *quare clausum fregit*, that the sub-letting to the plaintiff was at least a license to occupy, and that the plaintiff being in possession was entitled to hold it until the license was revoked by competent authority; and that authority derived from an administratrix of a *same* lessor, who obtained administration after the committing of the trespass did not relate back so as to justify it: *Littlejohn v. MacNamara*, Irish L. R., 9 C. L., 417.

Patrick Moynahan, holding under a

lease containing a clause against alienation without the consent of the landlord, assigned a moiety of the demised premises in 1869 to John Moynahan without obtaining the landlord's consent. In 1873 the reversion expectant on the lease was conveyed by the Landed Estates Court to John Moynahan and others as joint tenants. In 1874 John Moynahan mortgaged to the defendant. Patrick Moynahan brought an ejectment to recover possession upon the ground that the assignment of 1869 was a nullity, having been made without the landlord's consent: Held, that section 10 of "the Landlord and Tenant Act, 1860," did not apply to the peculiar facts of the case, and that the plaintiff was not entitled to recover: *Moynahan v. Hickey*, Irish L. R., 10 C. L., 253, counsel citing a considerable number of authorities, and discussing the question whether one joint tenant could consent so as to bind his co-tenants: see also on the latter point, *Williams on Real Prop.* (4th Am. ed.), 382, marg. p.

The lessees under a lease containing a covenant not to assign without leave, in the statutory form, made a voluntary assignment in insolvency, on the 17th of May, 1869. The assignee sold the stock in trade of the insolvents, who were dry-goods merchants, and the purchaser took possession of the premises from him on the 27th May, the assignee also occupying a room there for the management of the estate: Held, that such assignment was a breach of the covenant and a forfeiture, for the term passed to the assignee, under the provisions of the insolvent act, and if any election to accept it were necessary on his part, it was shown by his conduct: *Magee v. Rankin*, 29 Upper Can. Q. B., 257.

See *Lee v. Lorsh*, 37 Upper Can. Q. B., 262.

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Ancona v. Rogers.

[1 Exchequer Division, 285.]

May 18, 1876.

[IN THE COURT OF APPEAL.]

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*ANCONA V. ROGERS.

Bill of Sale—Possession of Goods by Grantor—Demand of Possession by Grantee—Bailor of Goods in Possession within Bills of Sale Act (17 & 18 Vict. c. 36).

Under the terms of an unregistered bill of sale of goods, given to secure a debt, the grantor was to be allowed to remain in possession of the goods until default in payment of the debt after demand. Default having been made, the grantee became entitled under the bill to take possession of the goods, and accordingly demanded them from the owner of a house in which the grantor had placed them, and threatened to take them by force. The grantor, however, remained in possession of the goods until she filed a petition for liquidation :

Held, reversing the judgment of the Court of Exchequer, that the fact that the grantee was entitled to and demanded possession did not take the goods out of the grantor's possession within the meaning of 17 & 18 Vict. c. 36, and that the trustee in liquidation was entitled to the goods as against the grantee.

Held, also (though not necessary for the decision), that if the grantor had bailed the goods with a bailee to hold on account of the grantor, the goods would still have been in the possession of the grantor within the act, and would not have been taken out of the grantor's possession by the fact that the grantee was entitled to and demanded possession.

THE plaintiff brought an action on the 20th of November, 1874, against a Mr. Horlock to recover certain household furniture, plate, linen, goods and chattels, which had been assigned to the plaintiff by a Mrs. Hewitt under an unregistered bill of sale, and which Mr. Horlock had refused to deliver to the plaintiff. The present defendant Rogers having claimed the goods as trustee in liquidation of Mrs. Hewitt, under a judge's order an interpleader issue was drawn up, in which the plaintiff affirmed, and the defendant Rogers denied, that the goods which were on the 20th of November, 1874, in the custody of Mr. Horlock, at Ogbeare Hall, Holsworthy, in the county of Cornwall, were on that day the property of the plaintiff as against the defendant Rogers.

At the trial in Middlesex, in January, 1875, in answer to questions put by Bramwell, B., the jury found that Mrs. Hewitt was in possession of the goods at Ogbeare Hall, and a verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter it for him, the court to [286] have power to draw *inferences of fact. The material facts are stated in the judgment of the Court of Appeal.

A rule *nisi* was afterwards obtained to enter the verdict for the plaintiff on the ground that there was no evidence that the goods were in the possession of Mrs. Hewitt at the

date of the adjudication of the insolvency ('), and that the learned judge ought so to have directed the jury, and that the act of Horlock refusing the plaintiff possession of the goods could not operate so as to create or continue possession in Mrs. Hewitt.

On the 10th of June, 1875, cause was shown by *McIntyre*, Q.C., and *W. Paterson*, the rule being supported by *Philbrick*, Q.C., and *Sutton*, and after consideration the Court of Exchequer, on the 7th of July, made the rule absolute to enter the verdict for the plaintiff (').

(') The rule was drawn up in these terms, which were evidently a mistake for "at the date of the filing of the petition for liquidation."

(') The judgment of the Court of Exchequer (Kelly, C.B., and Bramwell and Cleasby, B.B.) was read by

CLEARBY, B.: In this case, dealing with the facts proved and beyond dispute, I should consider that at the time of the petition the goods were not in the possession or apparent possession of Mrs. Hewitt within the meaning of those words in the Bills of Sale Act. They were certainly not in her apparent possession, and it appears to me that at that time the articles locked up in the rooms and the pianoforte which was in the hall were in the actual possession of Horlock, the owner and occupier of the house. She had been making some arrangements for taking the place, and in the expectation of doing so had sent down a quantity of live stock, of which the grantee under the bill of sale took possession, and also the household furniture, piano, &c., which form the subject of the present issue. She had written to Horlock to prepare to take them in, and they were accordingly taken and delivered to him there, the principal portion in the billiard room and the pianoforte in the hall. The keys of the rooms where they were placed were taken away by the person who left the goods. A notice was afterwards, and before the petition, served on Horlock, and the goods were demanded of him, and he was told that if he did not allow them to be taken they would be taken by force. He replied that they should not have them; that they were placed in his possession, and he would like to be there when they offered to take them. I do not think there is any difference between

the piano and the articles locked in the rooms. It would obviously be improper to leave a quantity of articles of furniture, great and small, in a stranger's house exposed to everybody, especially without any list or inventory, and I consider the key and the locking the door to have reference to safe custody, and not to affect the question of possession; and Horlock himself treated all the articles as being in his possession, and refused to deliver them, which gave rise to the action and interpleader. The goods being in the actual possession of Horlock, were no doubt in his possession without any title or property in himself, and his possession would be that of Mrs. Hewitt until the person having title to the goods demanded them; but as soon as that was done—and undoubtedly the plaintiff had the whole property in the goods—it would, I think, be incorrect to consider the goods as being in the constructive possession of Mrs. Hewitt within the Bills of Sale Act. The mere possession is not sufficient, because if they had been taken possession of by the claimant, and afterwards retaken possession of on behalf of Mrs. Hewitt, it is clear, I apprehend, that they would not have been in her possession within the act, because they were wrongfully in her possession; and so here, as soon as the goods were demanded of Horlock and withheld, any constructive possession which she had became wrongful; or rather, perhaps, was ended, and was not available in favor of the trustee against the real owner.

Although the opinion of the jury was taken on the question of possession, yet leave was reserved for the court to deal in the fullest manner with the evidence, and to draw inferences. The real facts were indeed

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287] *From this judgment the defendant appealed.

Feb. 21, 22, 1876. *McIntyre*, Q.C., and *William Pater-son*, for the defendant: First, the bailment to Bishop the warehouseman had ceased, and the goods while at Mr. Horlock's house, Ogbear Hall, were in the "actual possession" of Mrs. Hewitt, the grantor of the bill of sale. They were also in her "apparent possession" within s. 7 of the Bills of Sale Act, 17 & 18 Vict. c. 36, for they were in "premises occupied by" her, she having agreed to rent the rooms from Mr. Horlock. These are questions of fact which the court is to infer from the evidence. The possession of Mrs. Hewitt could not be determined by the demand of possession on the part of Ancona, the grantee of the bill of sale. If a creditor does not actually get possession, diligence in attempting to get it will not help him: per Mellish, L.J., in *Ex parte Jay* (*). Secondly, assuming that Mr. Horlock was bailee of the goods, Mrs. Hewitt as bailor still remained in possession of them within the meaning of the Bills of Sale Act, and could have maintained trespass against a wrongdoer. "No proposition can be more clear than that either the bailor or the bailee of a chattel may maintain an [288] action in respect of it against a wrongdoer; the *later by virtue of his possession, the former by reason of his property. This is laid down in 2 Roll. Abr., p. 551, pl. 22, 30; Com. Dig., Trespass (B. 4); and in other authorities:" per Parke, B., in *Manders v. Williams* (*). In Com. Dig., Trespass (B. 4), after saying that to entitle a man to bring trespass for goods he must have either the actual possession or a constructive possession in respect of the right being actually vested in him, it is said: "If trespass be done to goods in the hands of a bailee, trespass lies by the bailee: 2 Rol. 551, l. 31. And also by the bailor, and he who first recovers shall have the damages: 2 Rol. 569, l. 22." And see *Lotan v. Cross* (*).

Philbrick, Q.C., and *R. E. Webstor*, for the plaintiff: The evidence shows that Mrs. Hewitt was not in occupation of the rooms, or in actual or apparent possession of the goods. They were in the possession of Mr. Horlock as bailee, and there is nothing in the Bills of Sale Act to prevent the plaintiff from enjoying the right of property and right of possession given him by the bill of sale. The plain-

undisputed, and the only question is the proper legal conclusion to be drawn from them. For the above reasons we think the title of the grantee in the bill of sale ought to prevail, and that the rule ought to be made absolute to

enter a verdict for the plaintiff against the defendant Rogers.

(*) Law Rep., 9 Ch., 697, 706.

(*) 4 Ex., at p. 345; 18 L. J. (Ex.), 457.

(*) 2 Camp., 464.

tiff did all he could to obtain actual possession, and is within the principle of *Gough v. Everard*(¹) and *Robinson v. Briggs*(²). Mrs. Hewitt, the bailor, had no title to the goods, having assigned them to the plaintiff, and a bailee can have no better title than his bailor: *Batut v. Hartley*(³). "Possession or apparent possession" in s. 1 of the Bills of Sale Act must mean "actual or apparent possession," and it cannot be said that one who bails goods to a warehouseman is in "apparent possession," and he certainly is not in actual possession. The authorities cited with regard to trespass are irrelevant, because they assume that the property of the goods was in the bailor, whereas Mrs. Hewitt had transferred the property to the plaintiff.

McIntyre, Q.C., in reply: In *Gough v. Everard*(¹) and *Robinson v. Briggs*(²) the grantees of the bills of sale took actual possession.

Curr. adv. vult.

May 18, 1876. The judgment of the court (Cockburn, C.J., *Mellish, L.J., Baggallay, J.A., Mellor and [289 Grove, JJ.) was read by

MELLISH, L.J.: This was an appeal from a judgment of the Court of Exchequer on an interpleader issue directed to try the question whether certain furniture and other goods were the property of the plaintiff Ancona as against Rogers, the trustee of the estate of Mrs. Hewitt, a liquidating debtor. The plaintiff claimed under a bill of sale executed by the debtor. The defendant disputed the validity of the bill of sale under the Bills of Sale Act, upon the ground that on the day when the debtor presented her petition the goods were still in her possession.

Mrs. Hewitt borrowed various sums from the plaintiff between April and July, 1874, and on the 10th of September, 1874, she executed a bill of sale of the furniture and goods in question as a security for the repayment of the money with interest. By the terms of the bill of sale Mrs. Hewitt was allowed to retain possession of the goods until payment of the money was demanded, but if she did not repay the money with interest within twenty-four hours after demand, the plaintiff was entitled to take possession of the goods. The bill of sale was never registered. Mrs. Hewitt having given up her house in Sussex, and intending to go and reside at the house of Mr. Horlock, at Ogbeare Hall, Holsworthy, in the county of Cornwall, in a portion of his house to be afterwards arranged between them, delivered posses-

(¹) 2 H. & C., 1; 32 L. J. (Ex.), 210.

(²) Law Rep., 6 Ex., 1.

(³) Law Rep., 7 Q. B., 594.

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sion of the goods to one Bishop to keep for her for some time, and then to convey them to Ogbeare Hall. On the 12th of October the goods were brought by Bishop to Ogbeare Hall. Mr. Horlock was not at home, but Mrs. Horlock allowed the goods to be placed in four rooms, and Bishop, without any objection on the part of anybody, locked the doors of the four rooms, and took away the key with him. On the 23d of October the plaintiff served Mrs. Hewitt with a written demand for the payment of the money owing to him. The money not having been paid, the plaintiff, on the 27th of October, went to Ogbeare Hall, and demanded possession of the goods, both from Mr. Horlock's bailiff, and Mr. Horlock himself. He gave notice to Mr. Horlock of his title to the goods, and threatened to take them by force. Mr. Horlock, however, refused to allow 290] him *to enter the house, or to take possession of the goods. On the 4th of November Mrs. Hewitt presented her petition for liquidation.

Under these circumstances it has been held by the Court of Exchequer that Mrs. Hewitt was not in possession of the goods, at the time she presented her petition, within the Bills of Sale Act, and the court on that ground ordered the verdict found for the defendant at the trial to be set aside, and a verdict to be entered for the plaintiff. From this decision the defendant has appealed.

It seems necessary to consider, first, who was in possession of the goods after they were locked up in the rooms at Ogbeare Hall; and secondly, what was the effect of the plaintiff having become entitled to the possession of the goods by demanding the money, and of his attempt to obtain actual possession of them. Now there can be no doubt that the goods were delivered by Mrs. Hewitt to Bishop, and that Bishop took possession of them as her bailee, but we are of opinion that the bailment to Bishop terminated when the goods were placed in the rooms at Ogbeare Hall. It is true that Bishop locked them up, and took away the key, but he held that key as agent to Mrs. Hewitt, who was herself at Launceston; nor does it appear—and there is nothing to prove—that Bishop was intended to exercise any further dominion over them.

We will next consider whether the goods came into the possession of Mr. Horlock, and this depends upon the question, whether what took place at Ogbeare Hall amounted to a delivery of the possession of the goods by Mrs. Hewitt to Mr. Horlock, as bailee to hold for her, or to a delivery of the possession of the rooms by Mr. Horlock to Mrs. Hewitt.

This is a question of considerable nicety, but we are of opinion that what took place had the effect of a delivery of the possession of the rooms to Mrs. Hewitt for the purpose of keeping her goods in them. The delivery of a key is an ordinary symbol used to notify a change in the possession of the premises to which the key gives the means of entrance. The possession of premises cannot be changed solely by the delivery of a key, but where the delivery of a key is accompanied by an act which may amount to a change in the possession of the premises, the delivery of the key is strong evidence that it was the intention of the parties that the possession *of the premises to which the [291] key gives the means of entrance should be changed. It is true, that in this case the key was not delivered to Bishop, but taken by him. But the rooms were appropriated by Mrs. Horlock to the reception and custody of the goods, and no objection was made, then or afterwards, to the key being taken by Bishop, who was acting in the matter as the agent of Mrs. Hewitt. On the contrary, Mr. Horlock, on returning home, assented entirely to what had been done in his absence. Mr. Horlock was under no obligation to give Mrs. Hewitt possession of those rooms, and if he had dissented from what was done in his absence, and had opened the doors of the rooms, either forcibly or by another key, we think he would have re-obtained possession of his own rooms, and at the same time have obtained possession of Mrs. Hewitt's goods as bailee. There is, however, no evidence that he ever did open the doors prior to the 4th of November, and it is quite possible that he may have preferred to allow Mrs. Hewitt to have the use of his rooms to keep the goods in, rather than to take upon himself the responsibility of being the bailee of them.

We are of opinion, therefore, that Mrs. Hewitt was the only person who was in possession of the goods whilst they remained locked up in the rooms at Ogbeare Hall. If this conclusion is correct, the only other point which it is necessary to determine is, whether the fact of the plaintiff having become entitled to the possession of the goods, and having, although unsuccessfully, endeavored to obtain possession of them, takes the case out of the provisions of the Bills of Sale Act.

Now, if the case depended upon the Bankrupt Act, there is no doubt that the endeavors of the plaintiff to obtain possession would afford abundant evidence that the goods did not remain in the possession of Mrs. Hewitt with his consent,

but, as was observed in the case of *Ex parte Jay* (¹), there is a material distinction between the provisions of the Bills of Sale Act and those of the Bankrupt Act. In the Bills of Sale Act the words "with the consent of the true owner" have been purposely omitted, and the act is applicable if at the time the grantor of the bill of sale becomes bankrupt the 292] goods are in his possession, or apparent *possession, whether with the consent of the true owner or not. We think it was intended that if a man chooses to lend money upon a bill of sale, and does not register it, he should run the risk arising from his not being able to obtain possession of the goods before the grantor of the bill of sale commits an act of bankruptcy.

Although these observations are sufficient to dispose of the case, it may be desirable shortly to consider what would be the result if we are wrong in supposing that the goods were not delivered to Mr. Horlock as bailee. Now, if the goods were delivered to Mr. Horlock as bailee, there would be two questions to be considered: first, are goods in the possession of a bailee to hold on account of the bailor still in the possession of the bailor within the meaning of the Bills of Sale Act? And, secondly, if they are, were the goods taken out of the possession of Mrs. Hewitt by the plaintiff having required Mr. Horlock to allow him to take possession of them, and by Mr. Horlock having wrongfully refused to deliver possession of them?

Now, with reference to the first question, there is no doubt that a bailor, who has delivered goods to a bailee to keep them on account of the bailor, may still treat the goods as being in his own possession, and can maintain trespass against a wrongdoer who interferes with them. It was argued, however, that this was a mere legal or constructive possession of the goods, and that in the Bills of Sale Act, the word "possession" was used in a popular sense, and meant actual or manual possession. We do not agree with this argument. It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the Pantechmicon, would, in a popular sense, as well as in a legal sense, be said to be still in his possession, and we see no valid ground for holding that they are not still in his possession within the meaning of the Bills of Sale Act. As long as the person who has parted with goods by a secret bill of sale is having the goods kept for him and is

(¹) Law Rep., 9 Ch., 697.

exercising dominion over them, the case seems within the mischief against which the act is directed.

Lastly, we have to consider whether the demand made by the plaintiff requiring Mr. Horlock to deliver up the goods, and the refusal by Mr. Horlock to deliver up the [293 possession of the goods, assuming Mr. Horlock to be the bailee of the goods, had the effect of taking the possession of the goods out of Mrs. Hewitt. It was admitted in the argument before us, as it was impossible to help admitting, that this demand and refusal had not the effect of putting the plaintiff into possession of the goods. It was argued, however, that though the plaintiff never obtained possession of the goods, yet that the demand and refusal had the effect of taking the goods out of the possession of Mrs. Hewitt. We cannot understand how, if the plaintiff never obtained possession of the goods, the possession of the goods could be changed at all by the demand and refusal to deliver them up. Mr. Horlock had no title to the goods of his own of any kind, and if he held the goods on Mrs. Hewitt's account before he refused to deliver them up, it seems to us he still held them on her account after he refused to deliver them up. There is no evidence that he either attorned to the title of the plaintiff or set up any title of his own as against that of Mrs. Hewitt prior to the 4th of November. We think, therefore, that if the goods were ever delivered to Mr. Horlock as the bailee of Mrs. Hewitt, he still continued to hold them as her bailee on the 4th of November.

On the whole, we are of opinion, that the judgment of the Court of Exchequer ought to be reversed, and the rule to enter a verdict for the plaintiff, discharged.

Judgment reversed.

Solicitors for plaintiff: *Pattison, Wigg & Co.*

Solicitors for defendant: *Duignan & Smiles.*

C A S E S

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE,

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS,

XXXIX VICTORIA.

[1 Probate Division, 139.]

March 9, 1876.

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*LE SUEUR V. LE SUEUR.

Matrimonial Suit—Jurisdiction—Domicil of Wife deserted by her Husband—No Domicil, either real or acquired, of the Respondent in this Country.

A woman, having been deserted by her husband, who went to reside in the United States of America, acquired a *bona fide* domicil in England, and instituted a suit for dissolution of marriage against him by reason of his adultery and desertion. The original place of domicil of marriage and of matrimonial cohabitation of the parties was in Jersey, and the adultery proved was committed there. The husband had never had or acquired a domicil in England :

Held, that even if the petitioner, without a sentence of judicial separation, could acquire a distinct domicil in this country, she could not make her husband amenable to the *lex fori* of her new domicil.

This was a suit for dissolution of marriage brought by the wife by reason of the respondent's adultery and desertion. The parties were married in the Island of Jersey on the 26th of August, 1863, and finally separated on the 24th of August, 1872, when the respondent proceeded to the United States of America, where he has continued to reside.

The citation and petition were personally served upon him, but he did not enter an appearance.

Keogh, appeared for the petitioner.

Gorst, Q.C., and *Bowen*, for the Queen's Proctor.

SIR R. J. PHILLIMORE: When this case came before me in the first instance it appeared that the parties had been married in Jersey, which was also the place of their matrimonial domicile; that the wife, who is the petitioner, was resident in England, that the husband was in America, neither resident nor domiciled in England. I entertained grave doubts as to the jurisdiction of the court, but I was much pressed to hear the case upon the merits, in order, as the witnesses were all present, to save an increase of the expense, which would otherwise be incurred by the petitioner, and I consented to this course. After hearing the evidence and the argument of counsel for the petitioner, I came to a clear conclusion that the adultery and desertion of the husband were fully proved. The husband, the defendant, has not appeared. The proper evidence was given that he had been served *with a citation and with a certified copy [140 of the wife's petition at No. 73 Washington avenue, in the city of Chelsea, in the state of Massachusetts, in the United States of America, on the 6th day of March, 1873. The case then stood over for argument as to the jurisdiction of the court, and I thought it one of so much importance, that I invoked the assistance of the Queen's Proctor, in order that the point might be fully argued before me by counsel on both sides. I am very glad that I did so, because I have greatly benefited by the able arguments on both sides which have been addressed to me. The only facts which it is necessary to state for the limited purpose of considering the question of jurisdiction are the following: The parties were married in the island of Jersey on the 26th of August, 1863; they cohabited in that island until the 24th of August, 1872, on which day the husband deserted his wife and children and went to the United States of America, where he has since remained, and where, as I have already observed, he was duly served with notice of these proceedings. The law of Jersey does not allow the dissolution of the marriage contract, but it does allow a separation *à mensâ et thoro*. The first point raised on behalf of the petitioner was, that, inasmuch as Jersey was in the diocese of Winchester, it must be deemed to be in England, and therefore within the scope of the Divorce Act, 1857 (20 & 21 Vict. c. 85); but an examination of the ecclesiastical law applicable to Jersey, especially the canons passed in the reign of James I, sat-

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ifies me that the Bishop of Winchester had no original jurisdiction as to matrimonial causes in Jersey; and upon the whole I am of opinion that Jersey is as much exempt from the operation of the Divorce Act as Ireland or Scotland. The operation of the Divorce Act is confined to England.

The second and really important question in the case is whether the domicile of the wife in England (for I think it may be assumed that her *bona fide* domicile, so far as the law allows her to establish one, is in this country) has founded the jurisdiction of this court in a suit for a divorce in *vinculo* against her husband. It may well be that for other purposes than this, for matters affecting herself alone, the desertion by her husband, which must be considered as a proved fact in the case, has rendered it competent to her to establish a domicile of her own. I am not aware that any [41] *judicial decision has as yet gone to this length, but there is much to be said in favor of the proposition both on principle and analogy, and it receives some support from the dicta of Lord Cranworth in the case of *Dolphin v. Robins* (*). First, he considers the effect of a judicial decree *à mensâ et thoro*. "It may be," he says, "that where there has been a judicial proceeding enabling the wife to live away from her husband, and she has accordingly selected a home of her own, that home shall, for purposes of succession, carry with it all the consequences of a home selected by a person not under the disability of coverture." This doctrine, I may observe, is supported by the case, *Williams v. Dormer* (*). "I should add," Lord Cranworth then continues, "that there may be exceptional cases, to which even without judicial separation the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony, and been transported. It may be that in these and similar instances, the nature of the case may be considered to give rise to necessary exceptions. I advert to them only to show that the able argument of Sir H. Cairns has not been lost sight of. It is sufficient to say that in the appeal now before the House no such case of exception is to be found." These words were uttered in 1859. The doctrine that the domicile of the wife is necessarily that of the husband must surely admit of some exceptions, such as those referred to by Lord Cranworth. It is founded, indeed, upon the duty of the wife to live with her husband, but also on the pre-

(*) 7 H. L., at pp. 416, 419.

(*) 2 Robert. Eccl., 505.

sumption that he will be faithful to his marriage vow. If he disregard that obligation, if he commits an offence which entitles her either to a judicial separation or a divorce, her legal duty to live with him must undergo considerable modification, and in some cases entirely cease, for it is possible her continued cohabitation with him might disentitle her to the relief to which his misconduct uncondoned had entitled her. The courts of the United States of North America seem to have laid down these positions, first, that the wife may have a domicile distinct from that of her husband, and, secondly, that the courts of the *bona fide* domicile of either party may entertain a suit for a divorce. *The [142 Scotch courts have holden that a permanent domicile is not necessary to found their jurisdiction in a suit for divorce brought by either party, but that the *delictum* of adultery must have been committed in Scotland. Upon the whole I am disposed to assume, in favor of the petitioner, the correctness of the opinion that desertion on the part of the husband may entitle the wife, without a decree of judicial separation, to choose a new domicile for herself, and in coming to that conclusion I am aware that I am going a step further than judicial decisions have as yet gone.

The question remains: Is it competent to the wife to make the husband amenable to the *lex fori* of her new domicile? The judgments delivered since the passing of the Divorce Act as to the jurisdiction of the English Divorce Court over persons who were not subject to it by the *lex contractus*, or the original, or the acquired *lex domicilii* of the parties are, I think, conflicting. I have carefully examined all the judgments directly or indirectly bearing upon these important points. I will refer to some of them. In *Deck v. Deck* (') there was a petition for dissolution of marriage at the suit of the wife by reason of the husband's adultery and bigamy. The citation was served upon the respondent in the United States, North America. There was no appearance by him. On the evidence it appeared that the husband, a natural-born English subject, was at the time of the service of the citation resident in the United States, North America. In that case the Judge Ordinary said, "It appeared in evidence before us that the parties were married at Norwich in 1844. In 1848 a deed of separation was executed, and they ceased to live together. Soon afterwards the respondent went to America, and became domiciled there. In 1853 he intermarried in America with Louisa Halpin, and by her had one child. She afterwards,

(') 2 Sw. & Tr., 90; 29 L. J. (P. M. & A.), 129.

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in the Supreme Court of the State of New York obtained a decree of nullity of marriage on the ground of his having a wife living at the time when the marriage ceremony was performed. The citation out of this court was served on the respondent personally in America. On this evidence it was quite clear that the respondent had been guilty of bigamy and adultery; but a doubt was entertained whether [43] the court had jurisdiction to adjudicate on a *petition presented against a party domiciled in America. In that case it was holden that, notwithstanding the husband's change of domicile, the court had jurisdiction to dissolve the marriage. In 1859 in *Tollemache v. Tollemache* (¹), the full court decreed, at the prayer of the husband, a dissolution of a marriage contracted first at Gretna Green in Scotland, and then in England. After the marriage the parties principally cohabited in Scotland, and the wife, the respondent, contended that the court had not jurisdiction, and that a Scotch decree of divorce already made was valid. The original domicile of the husband was certainly English; and a jury to whom, somewhat strangely perhaps, the question of domicile was submitted, found that the husband still continued his English domicile. The full court held that they could not recognize the Scotch divorce of a domiciled Englishman, and decreed a new sentence of divorce. In the same year the case of *Yelverton v. Yelverton* (²) occurred. In that case the wife brought a suit for restitution of conjugal rights. The Judge Ordinary, finding that the marriage was Scotch, that the husband never had a residence in England, and had not been guilty of misconduct to his wife in England, though the husband had been personally served in Scotland with a citation and a copy of the petition, pronounced, after a careful examination of the cases on the subject of jurisdiction in the former Ecclesiastical courts, against the jurisdiction of the Court of Divorce laying down as principles of law (1.) that the domicile of the wife was that of the husband; and (2.) that *actor sequitur forum rei*. In 1860 occurred the case of *Callwell v. Callwell* (³), in which the husband was domiciled in Ireland, and had only a temporary abode in England at the date of filing the petition; and the wife appeared, and submitted to the jurisdiction of the court. The full court dissolved their marriage, which had been celebrated in Ireland, on the ground of adultery committed by the wife in England and

(¹) 1 Sw. & Tr., 557; 28 L. J. (P. M. & A.), 2.

(²) 1 Sw. & Tr., 574.

(³) 3 Sw. & Tr., 259.

on the continent. In *Simonin v. Mallac* ⁽¹⁾ the court held that it had jurisdiction to inquire into the validity of a marriage in England between foreigners domiciled abroad at the time of the marriage. In *Bond v. Bond* ⁽²⁾, *an [144 Englishwoman by origin, married in England to an Irishman, petitioned for a dissolution of the marriage on the ground of adultery and cruelty. The husband was served with a citation in Ireland, but did not appear. The court said, "According to this evidence, the petitioner was English, and therefore had a right, according to the 27th section of the Divorce Act, to present her petition; but the respondent appears to have had a residence in Ireland, from which, if that evidence stood alone, it might be inferred that his origin was Irish, and Ireland, for the purpose of this question, must be treated as a foreign country. If the evidence on this point had been so cogent as to compel the court to take notice that the respondent was not English, we must have decided whether or no the court can, consistently with the principles of international law, assume a right to adjudicate upon a petition presented against a foreigner, who is served abroad with a citation to which he does not appear. But the marriage was solemnized in England, and the respondent afterwards lived with his wife at various places in England, and although he has not appeared and submitted to the jurisdiction of this court, he has not contested it, and we do not find evidence of so conclusive a nature as to compel us to deal with him as an Irishman. The case is, therefore, the same as *Deck v. Deck* ⁽³⁾, and our decree is that the marriage be dissolved, and the respondent be condemned in costs."

I say nothing of the case of *Forster v. Forster* ⁽⁴⁾, as it is uncertain whether the subject of jurisdiction was fully argued before the court. In *Brodie v. Brodie* ⁽⁵⁾ the full court came to the conclusion that a husband petitioner, *bona fide* resident in England, not casually or as a traveler, can institute a suit in the Divorce Court, and this doctrine was accepted and enforced in *Manning v. Manning* ⁽⁶⁾. In that case the husband was resident in England when he instituted his suit, but the court held that his *bona fide* residence was still in Ireland, the domicile of origin, and declined to entertain the suit. The marriage, I presume, was

⁽¹⁾ 2 Sw. & Tr., 67; 29 L. J. (P. M. & A.), 97.

⁽²⁾ 2 Sw. & Tr., 93; 29 L. J., (P. M. & A.), 143.

⁽³⁾ 2 Sw. & Tr., 90; 29 L. J. (P. M. & A.), 129.

⁽⁴⁾ 8 Sw. & Tr., 144; 31 L. J. (P. M. & A.), 185.

⁽⁵⁾ 2 Sw. & Tr., 259; 30 L. J. (P. M. & A.), 185..

⁽⁶⁾ Law Rep., 2 P. & M., 223.

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[145] in Ireland. In *Shaw v. Attorney-General* (*) the *petitioner had obtained a divorce in a foreign country where her husband did not reside. No notice of the proceedings were personally served upon him. The citation was by advertisement, which did not reach him or come to his knowledge. Everything took place behind his back. As the learned judge observed: "A judgment so obtained has the incurable vice of being contrary to natural justice;" and he added: "In no case has it ever yet been decided that a man can, according to the laws of this country, be divorced from his wife by the tribunals of a country in which he has never had either domicile or residence." In *Wilson v. Wilson* (†) the parties had married and cohabited in Scotland, and in that country the wife had committed adultery. The husband came to England, and after some years instituted a suit. The court decided that he had abandoned his Scotch and acquired an English domicile, and exercised its jurisdiction. The court observed: "Whether any residence in this country short of domicile, using that word in its ordinary sense, will give the court jurisdiction over parties whose domicile is elsewhere, is a question upon which the authorities are not consistent." In this observation no doubt the learned judge (Lord Penzance) had in his mind the judgment of the House of Lords in *Shaw v. Gould* (‡). In that case there had been an English marriage between two English persons, who, however, never lived together; but the husband committed adultery, and some years afterwards consented to go to Scotland to found jurisdiction against himself, and did so, and a Scotch court pronounced a decree of divorce *à vinculo*. Their Lordships held that a Scotch marriage duly celebrated between the divorced wife and an Englishman, who was thenceforth domiciled in Scotland, did not give to the children of their union the character of lawfully begotten, so as to enable them to succeed to property in England, for that the Scotch divorce had not dissolved the English marriage. Lord Chelmsford said: "I think that *Lolley's Case* (§) cannot be pressed as an authority beyond this extent, that the Scotch court has no power to dissolve an English marriage, where the parties are not domiciled in Scotland, but have only gone there for such a time as would render them amenable to the jurisdiction of the Scotch *court. It certainly did not decide (as the Vice-Chancellor supposed), nor has any other case decided, that the law of this country did not recognize

(*) Law Rep., 2 P. & M., 156.

(†) Law Rep., 3 H. L., 55.

(‡) Law Rep., 2 P. & M., 435.

(§) Russ. & Ry., 236.

the right or authority of any court, whether domestic or foreign, to dissolve an English marriage for any cause or for any pretext whatever. On the contrary, *Warrender v. Warrender* ⁽¹⁾ appears to me to be a direct authority in support of the exercise of such a jurisdiction by the Scotch courts. It was not because in that case the husband's domicil was Scotch at the time of the English marriage that the court assumed the jurisdiction which was upheld by the House of Lords, but on account of the Scotch domicil which he had at the time he raised the action of divorce against his wife, which attracted her domicil, and brought her constructively within the jurisdiction. There can be no distinction in principle, as to the power of a Scotch court to dissolve an English marriage, between the case of a domicil existing at the time of such marriage and a permanent domicil afterwards acquired." Lord Westbury said: "It must be admitted that there has been a series of decisions in the Scotch courts to the effect that a permanent domicil of parties is not necessary to found a jurisdiction in the Scotch tribunals to pronounce a decree of divorce *à vinculo* between parties who have been married in England or any other foreign country, and that if the defendant in any such suit had been resident for forty days in Scotland, it is sufficient to subject him to the jurisdiction of a Scotch tribunal in a suit for divorce. It would, however, seem to be the law of Scotland that if the divorce be sought on the ground of adultery, the adultery must have been committed in Scotland. The whole reasoning of the judges in the Scotch cases is founded upon the right of the Scotch courts to redress any wrong committed by either of the spouses, if the act be done within the territory of Scotland, and that if divorce be sought on the ground of a personal wrong committed within the jurisdiction of a Scotch court, it is the right of the party who suffers the wrong to have that remedy which the law of the country affords. Such reasoning, however, although it may be good for maintaining the validity of the Scotch divorce in Scotland, cannot be required to be accepted by the tribunals of another country. The result is that a sentence *of divorce under such [147 circumstances may be binding in Scotland, although of no validity in the territory of England. The inconvenient consequences of this state of law are obvious, and have been frequently exposed with great force, particularly by Lord Brougham in his speech in giving judgment in the case of *Warrender v. Warrender* ⁽¹⁾; but this disgraceful

⁽¹⁾ 2 Cl. & Fin., 546.

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anomaly can only be removed by the Legislature." In conclusion, I must observe that upon this difficult and important subject neither the judgments of English tribunals, nor the opinions of accredited jurists, nor the practice of Christian states are in perfect harmony. The contract of marriage is often and truly said to be one *juris gentium*, inasmuch as it is a contract, not only concerning private rights, but deeply affecting public order. It is a question both of status and of contract. Perhaps the variety of opinion to be found in the authorities proceeds from the circumstance that some have considered it more exclusively under the former, and some more exclusively under the latter, character, but be that as it may, I must follow, to the best of my ability, the principles of English decisions. In the case before me the wife is suing her husband, not in the tribunal of the place of his original domicile, or of the marriage (according to the law of which, it is not immaterial to remark, the bond was indissoluble), or of the *delictum*, or of his residence, or of his acquired domicile, but in a tribunal to which he has never been subjected by any act of his own. I think that, according to the judicial exposition of the law in England by authorities which I am bound to follow in these circumstances, this court has no jurisdiction over the husband in this suit, and I must, therefore, dismiss it.

Solicitor for petitioner: *W. H. Roberts.*

[1 Probate Division, 150.]

April 4, 1876.

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*In the Goods of ASTOR.

*Testamentary Papers—General American Will—Special Will relating to British Funds—Separate Executors—Incorporation.**

An American, by a will and codicils, disposed of his property generally, and by a second will, in which he named separate executors, of moneys he had invested in the British funds. He expressed a distinct wish that the British will should take effect as a separate testamentary disposition of property independent of and disconnected from his general will:

Held, that it was unnecessary to incorporate the American will, which was very bulky, in the English probate, but that an authenticated copy of the American will and codicils should be filed in the registry, and a note be added to the English probate to the effect that such copy had been so filed.

WILLIAM BACKHOUSE ASTOR, of New York, United States of America, died on the 24th of November, 1875. He executed a will, bearing date the 17th of June, 1856, and nine codicils thereto, by which he disposed of the bulk of
151] his property. These papers *were exceedingly

lengthy, extending over three hundred folios, and were proved in the proper office at New York. The testator also executed another will, dated the 27th of June, 1862, with three codicils thereto, dated respectively the 12th of April, 1864, the 19th of January, 1865, and the 29th of May, 1869. The will commenced, "I, William Backhouse Astor, of the city of New York, merchant, in order to make the disposition hereafter expressed of the amount which at my decease I shall hold or be entitled to in the public debt of the United Kingdom of Great Britain and Ireland, commonly called Three per Cent. Consols, do devise and bequeath in manner following:" He disposed of the whole of the British Consols, and appointed his sons, John Jacob Astor and William Astor, and his friend Alexander Gillespie, of London, or in case of his death or declining, Robert Gillespie in his place, to be executors; and he concluded: "I declare and direct that this is to be deemed a special and limited will, applicable to the said British Consols only, and not to affect nor to be affected by any other testamentary paper by me made or to be made unless expressly referring to this property and this will. I revoke all other dispositions of this British debt." The third codicil, dated the 29th of May, 1869, contained the following clause: "In case, from any legal difficulty or impediment, my said special will or disposition of June 27, 1862, as varied by the codicils thereto, cannot receive probate or take effect as a separate testamentary disposition of my said British Consols, independent of and disconnected from my general last will and testament, which bears date June 17th, 1856, and to which there are several codicils, then I will and declare that the said special will or disposition of June 27th, 1862, in connection with and as varied by the several codicils thereto, including this one, shall take effect by way of further codicil to my said general will of June 17th, 1856; and to that end I do hereby republish the said separate will and its two codicils, all of which are hereunto annexed in connection with this codicil, and as varied by the said successive codicils in connection with this codicil, to stand in case of need by way of further codicil to my said general will. But I will and declare that in any case the provisions of the said special will and codicils as they now stand, giving effect to the codicils in their *order, shall take effect absolutely and wholly un- [152 affected and uncontrolled by anything contained in my said general will or the codicils thereto, unless it be as to the appointment of executors by my general will. But I declare that I, of course, did not and do not intend to con-

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stitute or appoint either the said Robert Gillespie or Alexander Gillespie to be an executor of my said general will." The only mention in the general will concerning the testator's property in England occurs in the first and second codicils. In the first codicil the testator says: "And I declare that any moneys, funds, or stocks which may be owned by me in England or France are not included in the provisions of my will and codicil, which shall not apply to the same in any manner." And in the second codicil he says: "To avoid misapprehension I declare that I expressly limit the application of this and my former codicil and of my will to estates, real and personal, within the United States of America." The only property of the deceased in England consisted of Three per Cent. Consols, amounting in value to about £400,000.

Searle, on behalf of one of the executors named in the English will, moved for probate of that will, and the three codicils thereto, without the incorporation in the probate of the general will and its codicils. Even although the costs need not be considered in this case, there would be great inconvenience from such incorporation by reason of the bulkiness of the general will. [He referred to *In the Goods of the Marquis of Lansdowne* ⁽¹⁾; *In the Goods of Dundas* ⁽²⁾; *In the Goods of Sibthorp* ⁽³⁾.]

SIR J. HANNEN (President): I am of opinion that I ought to grant this application. The question of incorporation in the probate of separate documents has frequently been a subject of consideration, and, I may say, a troublesome matter both to myself and my predecessors, in carrying out the jurisdiction I have now to exercise. I endeavored to lay down the principles which should guide me in these cases *In the Goods of Lord Howden* ⁽⁴⁾, in which I held that 153] where an English will ratifies and confirms a *foreign will, it is right that the latter should be incorporated in the probate. In the present case, however, the testator has carefully used the clearest and strongest language to indicate his intention of keeping the English property separate from the American, and for that purpose has made the English will, which does not purport to ratify or confirm the American will, but merely expresses his desire that, if the two cannot be kept totally distinct, the English will shall be treated as a codicil to the American one. I have come to the conclusion that his wishes need not be disappointed,

⁽¹⁾ 8 Sw. & Tr., 194; 32 L. J. (P. M. & A.), 121.

⁽²⁾ 32 L. J. (P. M. & A.), 164.

⁽³⁾ Law Rep., 1 P. & M., 106.

⁽⁴⁾ 43 L. J. (P. & M.), 26.

and that there is no reason why I should insist on the incorporation of the American will in the English probate. I think, however, it is right in granting probate of the English will that some such reference as that suggested by counsel should be made to the fact that there is an American will in existence, so that any person having an interest in the matter should be put upon its track. An affidavit, therefore, must be filed in the registry verifying copies of the American will and codicils, and, as I am told, is the practice sometimes in cases of this kind, a note must be appended to the probate that such an affidavit has been filed, so that the probate will carry with it upon its face a notice to all persons interested that they may see in the registry the documents which are referred to in it. I think that, as it is not desired that the American will shall be included in the probate, I am not bound to insist upon it against the wish of the English executor, and the course I have pointed out will prevent any mischief arising in the matter.

Solicitors: *Bischoff, Bompas & Bischoff*.

[1 Probate Division, 154.]

March 13, 1876.

[IN THE COURT OF APPEAL]

*SUGDEN and Others v. LORD ST. LEONARDS and [154 Others.

Probate—Lost Will—Presumption of Revocation—Secondary Evidence of Contents—Interested Witness—Declarations of Testator—Contents of Will not completely proved—Hearing of Cause by Judge of Probate Division without a Jury—Rehearing—Appeal—20 & 21 Vict. c. 77, ss. 35, 39, 61, 62, 63—Probate Court Orders of July, 1862, Rules 47, 49, 52, 59, 60—Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 19, 22, 49—Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 18—Rules of Supreme Court, Order xxxix, Rule 1; Order LVIII, Rules 2, 14.

The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence.

Brown v. Brown (8 E. & B., 876) approved and followed.

Declarations, written or oral, made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents (Mellish, L.J., dissenting as to declarations made after the execution of the will).

Quick v. Quick (3 Sw. & Tr., 442) overruled.

The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached.

When the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved.

When a cause in the Probate Division has been heard before a judge without a jury, the evidence being given *viva voce*, the parties may, if they please, apply for a rehearing under Rule 60 of the Probate Court Orders of July, 1862, or they may, without doing so, appeal from the decision of the judge, on the facts as well as the law, to the Court of Appeal.

THE plaintiffs, the Hon. and Rev. Frank Sugden, the Hon. Charlotte Sugden, and John Reilly, propounded, as executors, the contents of a lost will dated on or about the 13th of January, 1870, of the Right Hon. Edward Burtenshaw Baron St. Leonards, late of Boyle Farm, in the county of Surrey, deceased, who died at Boyle Farm on the 29th of January, 1875, at the age of ninety-three. They also propounded eight codicils to the said will, such codicils being produced and filed in the registry.

The declaration, after alleging, 1st, the due execution of the will and codicils, went on to allege:

2. That the said will never was revoked or destroyed by the testator, nor by any other person in his presence or by [55] his *direction, with the intention of revoking the same, and that the same was, at the time of his death, a valid and subsisting will, but that the same cannot be found.

3. That the contents of the said will were, in substance or to the effect, as follows: "This is the last will and testament of me, Edward Lord St. Leonards. I appoint my son the Honorable and Reverend Frank Sugden, my daughter the Honorable Charlotte Sugden, and my son-in-law John Reilly, trustees of this my will (the said John Reilly being substituted as trustee for his brother Francis Reilly after the execution of the said will, such substitution being confirmed by the said second codicil). I devise to the use of the said Honorable and Reverend Frank Sugden, the Honorable Charlotte Sugden, and John Reilly, and their heirs, my estates of Childerley Hall, in the county of Cambridge, of Sutton Scotney House, in the county of Hants, of Pease-more, in the county of Berks, of Tilgate Forest Lodge, in the county of Sussex, and of Boyle Farm, and the aits in the river Thames. Together with my land and cottages at Thames Ditton, in the county of Surrey, to hold the same (but subject to the charges hereinafter made thereon) upon the following trusts: Upon trust for my grandson Edward Burtenshaw Sugden for his life, and after his death for his first and other sons successively in tail male, and subject thereto for my grandson Henry Frank Sugden for his life, and after his death for his first and other sons successively in tail male, and subject thereto for my grandson Walter Sugden for his life, and after his death for his first and other sons successively in tail male, and subject thereto in trust for my said son Frank for his life, and after his death for his eldest son Frank for his life, and after his death for his first and other sons successively in tail male, and subject thereto for my son Frank's second son Edward for his life,

and after his death for his first and other sons successively in tail male, and subject thereto for my son Frank's third son Henry Richard for his life, and after his death for his first and other sons successively in tail male. And I hereby direct that the trustees of my said will shall, out of the rents and profits of the trust estates, keep up and pay the fire insurances on all the buildings situate on the said estates. And I further direct that no trees shall be cut down on the Tilgate Farm *Lodge Estate, which has been let on [156 a long lease, during the present tenancy to the annoyance or detriment of the tenant thereof. I give all my household furniture, books, plate, pictures, marble, bronzes, and china at Boyle Farm to my said trustees, to hold the same as heirlooms, to descend and be enjoyed with real estates hereinbefore devised so far as the rules of law and equity permit. I give unto my said grandson Edward Burtenshaw an immediate legacy of £750. And also all my carriage horses and farm horses, carriages, carts, with the trappings, and clothing belonging to them, and all my stable and garden implements, and all my wine and other spirits, and also my dairy stock, and the hay, corn, and stock in or belonging to my stables, and my household linen and household stores absolutely, with the exceptions hereinafter stated. I devise to my daughter Charlotte for her life, my house and grounds at Thames Ditton, at present let to the Reverend F. Style, together with two cottages adjoining thereto, the one let to Potter, and the other to Bartlett. Also Saint Leonards Farm, together with the house on the said farm at present let to Mr. Lewis, and two small houses on the same farm, one being let to Mr. Crowther and the other to Mr. Wardrop. And I direct that the said Reverend F. Style shall be at liberty to remain as tenant of the said house and premises at his present rent during the life of my said daughter, but in case he shall cease at any time to be tenant thereof during her life, then I direct that my said daughter shall have power to let the same at rack rent during her life, and upon the death of my said daughter I devise the said house and premises, farm, and cottages hereinbefore given to my said daughter for her life, to my said trustees, to hold the same upon the same trusts and subject to the same limitations as I have hereinbefore declared concerning my Childerley Hall and other estates hereinbefore devised. I give to my daughter Charlotte a legacy of £6,000, which I direct to be paid out of the policy moneys of £10,000 insured on my life. And I also direct that as she will be beginning housekeeping she shall have out of my farming stock two cows, to be

selected by herself, out of my conservatory two dozen plants, also to be selected by herself, and two dozen bottles of my old sherry. And I further direct that my grandson Edward Burtenshaw do deliver to her two loads of hay and two loads [57] of *straw. I also give to her the harp which was given to her by me some years ago, and I direct that she shall be at liberty to select and take out of her bedroom at Boyle Farm such ornaments and articles of furniture, many of which have been given to her by her mother and me, or purchased by herself, as she may think fit. And I also give her the sum of £750 to enable her, if she so desires, to make an addition to one of the houses devised by me to her for life, but I direct that it shall be entirely in her discretion whether to add or not to add to either of the said houses.

"And I further direct that my executors pay the sum of £2,000 to the trustees of the settlement of my daughter Juliet, made on her marriage with Kenneth Dixon, payable by my bond to the said trustees. I direct my house and establishment at Boyle Farm to be kept up by my executors at the cost of my estate for one month after my death for the use of my daughter Charlotte. I direct my executors to pay to my daughter Charlotte £60 per annum during the life of an aged person, to be named by her, to be applied by her for the benefit of that person. And I appoint my son Frank, my daughter Charlotte, and the said John Reilly, executors of this my will, and I give to the latter £200 for his trouble.

"This is an addition to my will. I devise my estate of Kingsdown, in the county of Kent, to the use of the trustees of this my will, their heirs and assigns, upon the following trusts: namely, upon trust for my son Frank for his life, and after his death for his son Frank for his life, and subject thereto for his first and other sons successively in tail male, and subject thereto for my son Frank's second son Edward for his life, and after his death for his first and other sons successively in tail male, and subject thereto for my son Frank's third son Henry Richard for his life, and after his death for his first and other sons successively in tail male, and subject thereto upon the same trusts as are hereinbefore declared with respect to my Childerley Hall and other estates hereinbefore devised in trust. Provided, however, and I direct that if my personal estate shall be insufficient for the payment in full of the pecuniary legacies bequeathed by me, and to discharge my testamentary and other expenses, until they shall have been fully paid, my son Frank shall only receive £300 a year out of the income

of *the Kingsdown estate, the rest of the income to [158 be applied to make up the deficiency. I further charge my estate of Kingsdown with the annual payment due from my son-in-law the Reverend Robert Mann to Queen Anne's bounty, for the building of the vicarage of Long Watton, in Leicestershire. I give to each of my three granddaughters, Georgina, Helen, and Caroline Jemmett, £150, and I also give to the trustees of my said will three life annuities of £50 each upon trust as to every of the same for one of my said granddaughters, and I hereby charge the same on my Childerley Hall and other estates firstly hereinbefore devised. I give £200 to my daughter Sophia Cleaveland, and £100 to her daughter Sophia, to whom also I leave my small gold watch and chain. I give to my daughter Caroline Turner £200, to my daughter Augusta Reilly £300; to her three daughters, Emily, Winifred, and Kathleen, £150 each; to my daughter Harriet Mann £200; to her daughter Florence £200; and to Juliet Pearson £100; and I direct that if any of the said legatees shall die in my lifetime, that in such case the said legacy shall lapse. I direct that my executors give all the domestic servants who shall be in my service at the time of my death one month's warning and one month's wages, in addition to the wages due to them. And I direct that the mourning of my servants and the expenses of my funeral shall be on the same scale as was observed on the death of my wife. I appoint my three daughters, Charlotte Sugden, Caroline Turner and Augusta Reilly, my residuary legatees. In the event of all the devises and limitations over hereinbefore contained respecting my real estate failing, then I devise Boyle Farm, with all the household furniture, books, plate, pictures, marbles, bronzes, and other effects to my grandson Edward Burtenshaw absolutely, and my estate of Kingsdown to my son Frank absolutely, and my estate of Peasemore to my daughter Charlotte absolutely."

The defendant, the Right Hon. Edward Burtenshaw Lord St. Leonards, the grandson and heir-at-law of the deceased, and his brothers and sisters, who were minors, and appeared by their mother as their guardian, pleaded

1. That the alleged will was not duly executed in accordance with the provisions of the statute 1 Vict. c. 26.

*2. That the said alleged will was duly revoked by [159 the said deceased by destroying the same with the intention of revoking it.

3. That the contents of the said alleged will were not as set out in the declaration.

4. That the codicils enumerated in the declaration were not respectively duly executed in accordance with the provisions of the statute 1 Vict. c. 26.

5. And for a further plea to the said last mentioned portion of the said declaration, and to each of the said codicils respectively, the said defendants say that the said codicils respectively were intended by the said deceased to be dependent upon and operate in conjunction with the will in the declaration mentioned, and to have no force or effect apart therefrom, and together with such will to form and do form one complete testamentary instrument and disposition, and that the said deceased duly revoked the said codicils respectively by destroying the said will, with the intention of revoking the said complete testamentary instrument and disposition.

The same pleas were pleaded by the interveners Miss Cleaveland, a granddaughter of the deceased, the Hon. Harriet Mann, a daughter of the deceased, Arthur Sugden, the son of a deceased son of the deceased, appearing by his mother as his guardian, and the children of Mrs. Jemmett, a deceased daughter of the deceased.

During the progress of the suit Miss Cleaveland married a Mr. Henderson.

The replication of the plaintiffs joined issue on the 1st, 3d, and 4th pleas.

As to the 2d plea, they denied that the alleged will was duly revoked by the deceased by destroying the same with the intention of revoking it, as in the said plea alleged, and took issue thereon.

As to the 5th plea, they denied the averments contained in the plea to be true, and further demurred to it as bad in substance, the matter of law to be argued being that the plea did not aver that the codicils propounded had been revoked in any of the modes indicated by 1 Vict. c. 26, as the only modes by which testamentary papers can be revoked.

[160] *The defendants and interveners joined issue on this replication and joined in the demurrer.

On the 22d of June, 1875, upon the application of the plaintiffs, and by consent, the judge made an order that the cause should be heard by the court itself, without a jury, and on the 17th of November, 1875, the cause came on for hearing before Sir J. Hannen (President), without a jury.

Hawkins, Q.C. (*Inderwick*, Q.C., and Dr. *Tristram*, with him), for the plaintiffs.

Dr. *Deane*, Q.C. (*Thesiger*, Q.C., and *Bayford*, with him), for the defendants.

Dr. *Spinks*, Q.C., Sir *H. James*, Q.C., *G. Browne*, and *Searle*, for interveners.

Several witnesses were examined to prove the due execution of the will and codicils upon which no question was raised. The principal witness as to the preparation and the execution of the will, and the only witness who was able to give evidence as to its contents, was the Hon. Charlotte Sugden, one of the plaintiffs. She was the only unmarried daughter of the deceased, and had lived with him for many years prior to and up to the time of his death. The substance of her evidence, and that of the other witnesses, is set out in the judgment of Sir J. Hannen. It is sufficient here to state that the will and all the codicils were holograph, that they were all kept in a small black box, something like a dispatch box, of which the deceased had the key; that the box was usually placed in the saloon used by the deceased as his sitting room at Boyle Farm; that the will was last seen by Miss Sugden on the 20th of August, 1873, when the last codicil was executed, and it was then replaced in the box; that during an illness of the deceased from September, 1873, until December, 1873, and again from March, 1874, when the deceased was attacked with his last illness, until his death, the box was in the custody of Miss Charlotte Sugden, and that after his death, although the codicils and some other testamentary papers were found in the box, the will was not there. Every possible search had been made for it, but it could not be found. There was evidence that the box was usually kept locked, and that the key was on a bunch kept by the deceased, that there was a *duplicate key kept in an escritoire, and that there [161] were five keys in the house by which the escritoire could be opened, one of these keys belonging to a wine cupboard in charge of the butler. Immediately after the will was found to be missing from the box, Miss Charlotte Sugden said that she recollected its contents, and then, at the suggestion of her solicitor, Mr. Trollope, she wrote out from memory, without reference to the codicils and other testamentary papers which were in the box, the following statement:

"The will appointed three trustees, his son Frank, his daughter Charlotte, and Mr. Francis Reilly, but the name of his brother, Mr. John Reilly, was afterwards substituted in his place, and is what is referred to in one of the codicils. The different estates were then vested in them in trust for his grandson; these consisted of Childerley Hall; Sut-

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ton Scotney House; Peasemore; Tilgate Forest Lodge; and Boyle Farm, with land and cottages in Thames Ditton and the aits; these were entailed on his grandson Edward B. Sugden, and his heirs male, and in succession, in default of any such, to his brothers Henry and Walter, and their heirs male; failing them, to his son Frank Sugden, and his heirs male, and in succession to each of his sons, Frank, Edward and Henry, and their heirs male. Then he entailed all the furniture, pictures, marble, bronzes, china and plate. In the same manner he left his grandson Edward B. Sugden an immediate legacy of money, the amount of which was afterwards changed (as referred to in the codicil) and a smaller sum substituted, and he then placed his name against it. He directed that, as Tilgate Forest Lodge was let on a long lease, no trees should be cut to injure the property. He gave absolutely to his grandson Edward B. Sugden all his carriages, horses, farming, and dairy stock (with an exception afterwards stated), hay, wine and spirits, linen, and household stores. To his daughter Charlotte he left £8,000, to be paid out of £10,000 life insurance, and a life interest in a house and grounds in Thames Ditton, let to the Rev. F. Style, and in two cottages adjoining. Also in St. Leonards Farm, and a house on the farm let to Mr. Lewis, and in two small houses on that property let to Mr. Crowther and to Mr. Wardrop. All these, after her death, were to go to the peerage entailed as before. He also left her two cows, which she was to select, and two dozen plants out of the *conservatory, which she was also to select, and two dozen bottles of the old sherry, and he directed his grandson to deliver to her two loads of hay and two of straw, as she would be beginning housekeeping, the harp he had given her some years ago, and she was to take all she wished from her own bedroom, many things in which had been given her by her mother and himself, or purchased by herself. He also left her £750 to build, if she wished it, an addition to one of the houses left her for life, but this was to be left entirely to herself. This is the sum referred to as having been revoked when he gave her a check on Messrs. Hoare for £1,500 to build a house on Second Meadow. He directed that £2,000 should be paid to his daughter Juliet, according to her marriage settlement. Kingsdown, the property he last bought, he settled on his son Frank, and entailed it on him and his sons Frank, Edward and Henry, and their heirs male, in default of such then to the peerage entailed on the heirs male the same as the other estates; he directed

that out of the rents of Kingsdown £350 should be paid to his son Frank until his other legacies should be paid, if the money was required, and he charged the estate with the annual payment of Queen Anne's bounty during the life of his son-in-law, the Rev. Robert Mann; there were directions about buying small pieces of land out of the rents, but these he afterwards struck out; legacies of sums varying from £150 to £200 were left as tokens of love to different members of his family, and were, as nearly as I can recollect, £150 each to his three granddaughters, Georgina, Helen and Caroline Jemmett; £200 to his daughter Sophia Cleaveland, £200 to her daughter Sophia, to whom he also left his small gold watch and chain; £200 to his daughter Caroline Turner; £200 to his daughter Augusta Reilly, and £150 each to her daughters Emily and Winifred; £200 to his daughter Harriet Mann, and £200 to her daughter Florence; if any died in his lifetime, the legacy was to lapse. He left £60 per annum to his daughter Charlotte for the benefit of an aged person to be selected by her. He named John Reilly, Frank Sugden, and Charlotte Sugden his executors, and he left his three daughters Charlotte, Caroline and Augusta, residuary legatees. He directed Boyle Farm to be kept up for a month for the use of his daughter Charlotte. His servants were to have a month's warning, a month's wages; and the *mourning for his servants [163 and funeral expenses were to be the same as on the death of his wife.

(Signed) "CHARLOTTE SUGDEN."

After Miss Charlotte Sugden had written out the statement and shown it to her solicitor, some questions were put to her, and in answer to them she wrote out the following additional statement:

"This is the best of my belief. There were also legacies. In case of all heirs male failing, to his grandson E. B. Sugden he left Boyle Farm and its contents absolutely; Kingsdown to his son Frank absolutely; and Peasemore to his daughter Charlotte absolutely. I do not remember how the rest was left, though I know he left them to different members of his family. He directed his trustees to keep up the fire insurance on his estates, including his daughter Charlotte Sugden's house.

(Signed) "CHARLOTTE SUGDEN."

No evidence was called by the defendants and interveners, and the questions argued were, first, whether there was sufficient evidence of the contents of the will; and, sec-

only, whether there was evidence to rebut the presumption of revocation arising from the disappearance of the will.

No question arose upon the codicils, but their contents were referred to as corroborating (according to the plaintiffs' argument), and as being to some extent inconsistent with (according to the defendants' and interveners' argument), the recollection of Miss Sugden as to the contents of the will. It is therefore necessary to set them out, and also to set out some of the other testamentary papers found in the box and referred to in the argument and in the judgment.

The codicils, omitting the attestations and the signatures of the attesting witnesses, were as follows:

"This is a codicil to the will of me, Edward Lord St. Leonards. I have struck my pen through so much of my will as provides legacies for life of £50 per annum to every of my three granddaughters, Georgina, Helen and Catherine Jemmett, and the charge thereof on my principal estate devised to my grandson *Edward Burtenshaw, and I hereby revoke the said gifts and charges, and in lieu thereof I give to the trustees in my will named three like life annuities of £50 each, making £150 per annum, upon trust as to every of the same for one of my said granddaughters during her life, and to cease and not go over on her death, and the said life annuities shall be a charge upon, not the estates directed by my will, but upon my Kingsdown estate, in the county of Kent, devised by my will, with rights of distress and entry to compel payment thereof, if and when in arrear, in like manner as by law landlords may distrain for rents in arrear. And I direct the life annuity of every one of my said three granddaughters to be paid to her as far as the law allows into her own hands, for her sole and separate use, free from marital control, and for which her receipts shall be discharges, but without any power of anticipation. As my object is to add somewhat to the portions of my said three granddaughters under the marriage settlement of their parents, and not to substitute my donations for such portions, I direct that if any one or more of them shall in my lifetime, or after my decease, assign over or part with, or agree to do so, the portions or portion under the settlement belonging to them, except upon marriage, the life annuity or life annuities of every or any such granddaughter shall never take effect, or shall thereupon cease and be no longer payable, as the case may be. The annual sum which I have allowed to my grandson Edward Burtenshaw will

cease upon my death ; a proportionate part is to be paid to him up to my death, and also within fourteen days after my death £70 as a legacy. In all other respects I ratify my said will. In page 1 of this codicil I have put my initials to an interlineation, and also one in page 19 of my will, and which interlineations were so signed by me before I sign this codicil, or the witnesses attest it. In witness whereof I do to this my codicil, set my hand this 23d day of March, 1870.

“ST. LEONARDS.”

“This is a second codicil to my will. The principal alteration in my will is the substitution of another person as my trustee, and as such legatee in the place of the trustee, and, as such, a legatee in my will. The parts through which I have run my pen I do hereby revoke. In all other respects I ratify my said will and *first codicil. My [165 additional initials were signed by me before I signed this codicil, or the witnesses attested it. In witness whereof I sign this codicil this 4th day of July, 1871.

“ST. LEONARDS.”

These codicils were indorsed :—

“A codicil to my will,

“23d March, 1870.”

“A second codicil to my will,

“4th July, 1871.

“Re-signed by me, having first placed my initials opposite to an erasure upon revocation by me of certain figures in line 15. In witness whereof I sign my name.

“St. Leonards.

ST. LEONARDS.”

“I made a third codicil to my will which I hereby revoke, and this is the third codicil to my will. By my will, I gave to my dear daughter Charlotte £750 for the purpose of building, in addition to the legacy thereby bequeathed to her, and which legacy I hereby confirm, and I, by the third codicil hereby revoked, gave her a life interest in my Second Meadow (next to Boat House Close), with remainders over, and £1,500 to build a house on it. Now I hereby revoke the said legacies of £750 and £1,500, and the life interest in my Second Meadow, and the remainders over, and in lieu thereof I give to my said daughter Charlotte, her heirs and assigns, my said meadow. (In margin—St. L. £750 and £1,500 revoked, because paid by me.)

“In witness thereof, I sign this my third codicil, this 16th of September, 1871.

“ST. LEONARDS.”

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The codicil was indorsed :—

“16th of September, 1871.

“A third codicil to my will.”

“20th of September, 1871.

“This is a fourth codicil to my will. I revoke the devises in my will or former codicils contained, so far as they are devises of my meadow, called Boat House Close. I have [166] by my last codicil *given to my dear daughter Charlotte, in fee simple, my ‘second meadow,’ which adjoins my said first mentioned meadow, called Boat House Close, and I devise the said Boat House Close to my said daughter Charlotte, her heirs and assigns forever, so that she will be entitled in fee simple to both the said meadows, and these are in addition to the legacies and provisions made for her by my will and codicils and not since revoked. In witness whereof, I sign this my fourth codicil, this 20th of September. 1871. .

“ST. LEONARDS.”

“24th of November, 1871.

“This is a fifth codicil to my will. In addition to all my previous gifts to my daughter Charlotte, I hereby give to her, in fee simple, my meadow called Shoulder of Mutton Close, so that she will be entitled to all my meadows in the Summer Road in fee simple. In witness whereof, I sign this my fifth codicil, this 24th of November, 1871.

“ST. LEONARDS.”

Indorsed :—

“20th of September, 1871.

“A fourth codicil to my will.”

“24th November, 1871.

“Fifth codicil.”

The sixth codicil was commenced on the back of the third codicil, following the indorsement, “A third codicil to my will,” and was as follows :—

“25th March, 1872.

“This is the sixth codicil to my will. I have paid to my daughter Charlotte the £1,500 legacy given to her by my third codicil ; therefore I revoke the legacy of that sum to her by the within written codicil. She intends, with my permission, to build herself a house on Second Meadow, which meadow, upon my death, will belong to her. In the meantime, I authorize her to erect such building, and to enjoy and occupy it as she may desire.

“ST. LEONARDS.

"I sign this, my sixth codicil, this 27th day of March, 1872."

*The month and year were written in the margin, [167 and the codicil was continued on a separate sheet of paper as follows:—

"A continuation of my sixth codicil.

"I give to my son Frank, in addition to the other devises to him, my Sutton Scotney Farm and the manor and village property there to my son Frank Sugden for his life, and I revoke so much of any previous devise by me as would interfere with that gift, but no further; and after his death, I declare that it shall return to the several uses declared of it by previous devises by me. And I charge the said Sutton Scotney estate with the payment of £100 a year to my daughter Harriet Mann during her life, for her inalienable separate use. And I hereby revoke my previous devises of my Tilgate estate, in the county of Sussex, and I devise it to my daughter-in-law Marianne Sugden, widow of my late son the Hon. Henry Sugden, for her life, and after her decease, to her second son Henry Frank, his heirs and assigns, subject to the conditions in my said will contained for the benefit of the present tenant. In witness whereof, I sign this my sixth codicil.

"ST. LEONARDS."

"This is a seventh codicil to my will.

"I give to my son, the Hon. and Rev. Frank Sugden, for his life, Boyle Farm house, and the gardens and grounds and buildings belonging to it, and the two meadows opposite (the fifteen acres and the two acres), and the aits on the Thames, and he is to have the enjoyment during his life of the pictures, bronzes, china, plate, marbles, and all articles of vertu and furniture in and about Boyle Farm. And after his death the same shall revert to the uses named in my will, and I revoke any gift in my will or any codicil contained, so far as, and only so far as, it would interfere with these directions. I revoke the gifts in my will contained to my grandson Edward Burtenshaw of my carriage horses, and farm horses, and all my carriages and carts, with the trappings and clothing belonging to the same, and all the stabling and garden implements, and all the wine and other spirits of which I shall die possessed, and also my dairy stock, and the hay, corn, and stock in, or belonging to, my stables, and I give the same to my said son Frank Sugden, save and except the sherry given to my said daughter Charlotte, and

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168] which is to be delivered *to her. This is a codicil to my last will. In witness whereof, I have hereunto set my hand this 1st of May, 1872.

“ST. LEONARDS.”

Indorsed :—

“Sixth and seventh codicils to my will.

“ST. LEONARDS.

“1st of May, 1872.”

“This is a further codicil to my will.

“Whereas my daughter Charlotte has, with my leave, built herself a house for her occupation when this house passes away. And whereas under my will and codicils she become possessed of the three meadows, Boat House Close, Second Meadow, and Shoulder of Mutton Field, and her house is built on Second Meadow, and it will be her residence when I depart this life. Now I declare and direct that Second Meadow and her house upon it shall be considered altogether as Second Meadow, and as such shall pass to and belong to her in fee simple, so that her present interest in Second Meadow and the house upon it may be added to my present interest in that meadow and the house upon it, and go along with it to her, as I have said, in fee simple. In witness whereof I sign this my eighth codicil this 20th of August, 1873.

“ST. LEONARDS.”

The following papers, marked J. and K., also holograph, were found with the codicils in the box :—

		“J.”	
	Legs.		Kingswood.
C.	750		F. £300 a yr.
	6,000		
S. Cd.	200		Rt. M. Q. A. B.
Her dau.	100		Legs.
Aug.	300		other Estates
Girls	450		£150 p. ann. 3 Girls.
Ht.	240		
Florence	200		
Jt. P.	100		
	200		
	<u>8,540</u>		

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*Exps.	2,000 Jt.		[169
Debts, &c.	{ 2,500 Exps.	Persl. est.	21,240
	{ 1,000 Debts, &c.		14,040
	5,500	Surplus	7,200
	8,540	Edwd.	720
	<u>£14,040</u>		<u>£6,480</u>

March, 1870.

1871.

Equitable	10,000	
Do. say	200	
Railway	3,000	
Do.	800	
Turkish Bonds	3,420	£4,000
India 5 p. Ct.	1,120	10,000
Balce. at Bankers	1,100	1,200
Arrears of rent, say	2,000	
	<u>20,640</u>	600
Arrears of pension, say	600	9,500
	<u>21,240</u>	<u>15,100</u>

"K."

Oct. 1867.

Present rental, nearly net.

1,580 Childerley.

1,000 Sutton Scotney.

250 Tilgate.

120 my farm.

82 Style's house and land.

18 cottages, &c., do.

Crowther cott. and land.

25 Wardrop Cottage.

50 Giggs Hill Cotts.

14 Cottages, late Sullivan's.

35 Church Cottage.

*17 4 Cottages in Street.

30 Say Timber at Tilgate.

[170

£20 added
Charlotte
for life

£305

3,281

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1,260 Peasemore.

~~88 Tithe Rent Charge.~~4,62940 Cotts. and Manor of Sutton
Scotney, an average.4,6694,669

88 settled on Arthur's family.

4,581

Oct. 1867.

Land in hand. Annual value.

£

36 3 meadows in lane.

60 2 Fields in Road.

96

× 600 Boyle Farm Paddock and Aits.

£696 p. ann. value.

4,669 Rental.

5,365

× £800

£4001,000 p. ann. for Boyle Farm furnished Cotts.
and Paddock and Aits.£5,365 Rental and value.× 400 p. ann. for Pictures, Plate, and furne., &c.,
in Boyle Farm.£5,765

[171] *A copy, not holograph, but in Miss Sugden's handwriting, of a second codicil, which was destroyed by the deceased after its execution in consequence of the matrimonial engagement to which it referred being broken off, was not found in the box, but was produced in the course of the proceedings. It was as follows:—

“This is a second codicil to my will, this 18th of April, 1870, and the date will show to those interested why I

changed the disposition in my will. I revoke the legacy of £700 by my codicil given to my grandson Edward Burtenshaw; and I revoke all the immediate and reversionary life, in fee, and other interests in my several estates and in my heirlooms in my will devised to my said grandson, and all such life, in fee, and other interests are to be subject to the following proviso, viz.: Provided always that if my said grandson shall intermarry at any time with . . . , then and immediately thereupon such life, in fee, and other interests so given or provided for my said grandson shall cease and become void, and I hereby revoke them, and thereupon all the properties in and over which any interest is given to him by my will shall vest in the trustees named in my will, their heirs, executors, and administrators, upon trust to pay to my said grandson during his life from and after such intermarriage a clear yearly income of £800 by two equal payments in every year, and upon such other trusts, but none of them in favor of my said grandson, as I shall declare by another codicil to my will. And I direct the payments by my will and first codicil directed to be paid out of Kingsdown not to be so paid, but to be a charge upon and to be paid out of the estates of which my grandson is by my will made tenant for life, and those payments are the one yearly paid by me for my son-in-law Robert Mann, and the three life annuities of £50 apiece which I have given to three of my granddaughters. In witness whereof I do to this my second codicil set my hand this 18th day of April, 1870. ST. LEONARDS.

"The two interlineations and the erasure were made before I signed the codicil."

The eldest son of the deceased, Henry, died in 1866, leaving his eldest son, the defendant, the present Lord St. Leonards, and another son surviving him. The second [172 son, Frank, one of the plaintiffs, had two sons. The third son, Arthur, predeceased the testator, leaving a son, the intervener Arthur, an infant, surviving him. There were several daughters, all of whom were married, with the exception of Miss Charlotte Sugden, one of the plaintiffs, and some of whom predeceased the testator and left issue surviving them.

At the close of the evidence,

Hawkins, Q.C., for the plaintiffs, addressed the court on the two questions raised: First. Whether there was sufficient evidence of the contents of the missing will to enable the court to pronounce for the contents as propounded.

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Secondly. Whether there was evidence to rebut the presumption of revocation arising from the disappearance of the will.

1. The evidence of Miss Sugden is corroborated by the declarations of the deceased made at various times between the date of the will and his death to various persons, and also by the testamentary documents in the deceased's handwriting. Miss Sugden's integrity is not disputed, and the only question is as to the accuracy of her recollection. She had remarkable opportunities of making herself acquainted with the contents of the will, for it was carefully read over to her by the deceased before its execution, and after its execution she herself read it over, and she had her attention recalled to the contents whenever the deceased, by a codicil, made any alteration in its dispositions. There is every probability that the contents should become, as she says they were, firmly impressed on her memory.

2. It cannot be doubted that, on the 23d of August, 1873, the date of the last codicil, the will and the eight codicils were locked in the box by Lord St. Leonards, and he had given no indication of a desire to revoke any one devise or bequest contained in either of those documents. The box was locked, not by a patent key, but by an ordinary key, and there was a duplicate key kept in the *escritoire*. The *escritoire* could be opened by no less than five keys, one of which was under the charge of the butler for the time being. Many persons, therefore, besides Lord St. Leonards might, if they were so minded, have obtained access to the box in 173] *which the will and codicils were kept, and it is doubtful whether a will so placed can be said to have been in the custody of the deceased, in such a sense as to give rise to the presumption of revocation because it was missing after his death. But assuming that presumption to have arisen, it is rebutted by all the probabilities of the case, and by repeated declarations made by the deceased down almost to the moment of his death, showing not only that he did not wish to die intestate, but also that he believed that he was not intestate and that the will was in existence. [The cases of *Brown v. Brown* (1) and *Welsh v. Phillips* (2) were cited.]

Dr. Deane, Q.C., for Lord St. Leonards: 1. Admitting to the fullest extent the integrity of Miss Sugden, and her desire to tell the truth as to the contents of the will to the best of her recollection, she must, nevertheless, be subject to failure of memory, to confusion of ideas, and to mistake.

(1) 8 E. & B., 876; 27 L. J. (Q.B.), 173.

(2) 1 Moo., P. C., 299.

Her statements are only to the best of her belief, and some of the statements made by her in the first instance she has since had to qualify, and, in one instance at least, the legacy to Lord St. Leonards, she has admitted that she was mistaken. It is evident, from the number of testamentary papers, that the mind of the deceased was constantly fluctuating as to the disposition of his property, and looking at the number of changes in the intentions of the deceased, his frequent conversations with Miss Sugden as to those changes, and the different testamentary documents brought to her knowledge at different times, is it possible for the court to accept her recollection of the contents of one of these documents as so complete and accurate as to entitle it to probate? It is proved that the deceased was, above all things, anxious that a suitable provision should be made for the peerage; but if the will as propounded should be established, no provision whatever is made for the peerage in the not improbable event of its devolving on Arthur Sugden.

2. The box in which the will had been contained was undoubtedly in the deceased's custody down to the time of his death. No suggestion has been made as to any person who was likely to have been guilty of the crime of abstracting the will, and it is difficult to conceive what motive or object any person could have *had for committing such a [174 crime. If any one did abstract the will from motives of malice or curiosity, why were the codicils left? If mere curiosity was the motive, the will might have been replaced after that curiosity had been gratified. That the deceased had ample opportunity of taking the will from the box and destroying it cannot be doubted. It is highly probable that when he reflected on the inartistic drawing of the will, and the alterations made in it by the codicils, and especially when he remembered that no provision had been made for the peerage in the event of its devolving upon Arthur, he should have made up his mind to revoke the will, leaving the codicils in force. Perhaps he intended to make a fresh will, and died before that intention was carried into effect. [The following cases were cited by Dr. Deane: *Patten v. Poulten* (1), *Cutto v. Gilbert* (2).]

Sir H. James, Q.C., for Mr. and Mrs. Henderson: The question is, whether the parol evidence which has been produced of the contents of the will has reached that standard of proof which has hitherto been considered necessary before the contents of a written document could be established by

(1) 1 Sw. & Tr., 55; 27 L. J. (P & M.), 41.

(2) 9 Moo. P. C., 131.

parol. In *Wharram v. Wharram* (1) Lord Penzance pointed out how necessary it was to require the strictest proof of the contents of a will as distinguished from other documents, especially since the passing of the Wills Acts. In *Patten v. Poulten* (2) the contents of a will were proved by oral evidence, but it was a short and a very simple will, and a draft was produced. In the present case we are dealing with a large and extremely complicated will, filling at least nineteen pages, and drawn by a testator of exceptionally acute mind, and thoroughly familiar with legal terms, and their exact legal meaning. It is hardly in the power of human memory to retain a complete and accurate recollection of such a will. The declarations of the testator, although admissible to show adherence to the will, and to rebut the presumption of revocation, are not admissible to prove the contents of the will: *Quick v. Quick* (3); *Doe d. Shalcross v. Palmer* (4).

[175] **Thesiger*, Q.C., for the other defendants, and for Mrs. Mann: The oral evidence by which the contents of a will may be proved should be more cogent and conclusive than is required for the proof of the contents of an ordinary contract, or any other written document, for this reason: in cases of contract, or other documents of a similar character, there must be two parties having conflicting interests, who are aware of the contents, and may give evidence of them, whereas from the very nature of wills it is impossible to contradict a person coming forward and professing to have read a will of which the contents were only known to himself and to the testator. [He referred to *Vallance v. Vallance* (5), *Trevelyan v. Trevelyan* (6), *Burls v. Burls* (7), *Patten v. Poulten* (2), *Finch v. Finch* (8), *Davis v. Davis* (9), *In the Goods of Gardner* (10), *Foster v. Foster* (11), *Martin v. Laking* (12), and *Knight v. Cooke* (13).] Considering the fallibility of human memory, the intricacy of the will, the admitted imperfection of Miss Sugden's memory as to some parts of the will, can the court come to the conclusion that it is in possession of the complete mind of the testator as to the disposition of the bulk of his property, and especially of his residuary personal estate? As to the admissibility of declarations of the testator for the purpose of

(1) 3 Sw. & Tr., 301; 33 L. J. (P. M. & A.), 75.

(2) 1 Sw. & Tr., 55; 27 L. J. (P. & M.), 41.

(3) 3 Sw. & Tr., 442; 33 L. J. (P. & M.), 146.

(4) 16 Q. B., 747; 20 L. J. (Q.B.), 367.

(5) 1 Hagg. Ecc., 693.

(6) 1 Phillim., 149.

(7) 3 Law Rep., 1 P. & M., 472.

(8) Law Rep., 1 P. & M., 371.

(9) 2 Add., 223.

(10) 1 Sw. & Tr., 109.

(11) 1 Add., 462.

(12) 1 Hagg. Ecc., 244.

(13) 1 Lee, 413.

rebutting the presumption of revocation he referred to *Keen v. Keen* ⁽¹⁾.

Nov. 25. SIR J. HANNEN (President): I have on this occasion to discharge the functions of a jury, and to give my verdict upon certain questions of fact, and my decree in the cause will be pronounced upon the basis of the findings at which I may arrive upon those questions. They have now been reduced to two; namely, first, what were the contents of the will, which it is admitted was duly executed and attested upon the 13th of January, 1870; and, secondly, was that will revoked, was it destroyed by the testator *animo revocandi*?

Now it is necessary that I should deal with these questions in *the order in which I have stated them, be- [176
cause it is obvious that the question whether or no the testator revoked this instrument must depend to a considerable degree upon what conclusion I may arrive at as to the contents of the instrument itself. It is obvious that where a will, shown to have been in the custody of a testator, is missing at the time of his death, the question whether it is probable that he destroyed it must depend largely upon what was contained in the instrument. Was it one arrived at after mature deliberation; did it deal with the interests of the whole of his family, carefully arranging the dispositions which he would make in favor of the several members of it, or was it the hasty expression of a passing dissatisfaction with some one or more of them? These are questions naturally having the strongest possible bearing upon the ultimate question which I may have to determine, namely, whether or not the testator himself destroyed this instrument. It is undoubtedly a great misfortune that, in order to arrive at a conclusion as to what the contents of the will really were, I have to rely upon secondary evidence; but I have already had occasion to remark that there is not, in my judgment, any difference in the principles of law applicable to the case of a lost will and to the case of any other lost document. That was decided in the case of *Brown v. Brown* ⁽²⁾, which has been referred to in the course of the arguments; and although there are some expressions in the case of *Wharram v. Wharram* ⁽³⁾ made by my predecessor, Lord Penzance, which are not altogether in harmony with the decision in *Brown v. Brown* ⁽²⁾, yet, as has been observed by that very learned judge and author, Sir Edward Vaughan Williams, in his work on Executors, Lord Pen-

⁽¹⁾ Law Rep., 3 P. & M., 105.

⁽³⁾ 3 Sw. & Tr., 301; 33 L. J. (P. M.

⁽²⁾ 8 E. & B., 876; 27 L. J. (Q.B.), 173. & A., 75.

zance does not himself appear to have adhered substantially to the views which he expressed in *Wharram v. Wharram*⁽¹⁾. I not only accept *Brown v. Brown*⁽²⁾ as an authority upon the point, but I must say it is exactly in conformity with my own views. I have, therefore, to enter upon an examination of the question, what was contained in this will? It is unfortunate that the secondary evidence should to so large an extent be entirely of a parol character. It would have greatly strengthened the certainty with which [177] I should deal with that *secondary evidence if it had consisted of the draft of the instrument that is missing; but that, as was observed by Lord Campbell in *Brown v. Brown*⁽³⁾, only goes to the value of the evidence. It imposes upon me, however, the duty of exercising the utmost possible caution in dealing with evidence of this character. But if, notwithstanding the disadvantage I labor under, I arrive at a clear conclusion as to any of the contents of this will, it is my duty to find as a fact that such contents were a portion of the missing document.

I have felt with full force the value of the observations which have been addressed to me in the very able speeches which I have heard from those representing the several defendants in this case. Undoubtedly there is great danger in accepting evidence derived from the recollection of any person as to the contents of an instrument of this kind; that danger is greatly enhanced when such evidence is derived from a person deeply interested in establishing the instrument in the form in which that person alleges it existed. But, on the other hand, there would be very great danger if a court were to lay down an arbitrary rule that in the event of a document, however important in its character, being missing, whether as the result of fraud or accident, it should be impossible to establish its contents by parol testimony. That might lead to the defeating of justice in many, if not in as many, instances as might arise from the court acting upon such testimony. While I feel the difficulty and the danger that has been pointed out, yet it is right that I should observe what there is to be said on the other side with reference to Miss Sugden's testimony in this case. Undoubtedly, if the evidence of the contents of a long and complicated will were given by a professional man who had himself drawn the instrument or upon one or repeated occasions had had the opportunity of reading it, that would, under ordinary circumstances, be more satisfac-

⁽¹⁾ 3 Sw. & Tr., 301; 33 L. J. (P. M. ⁽²⁾ 8 E. & B., 876; 27 L. J. (Q.B.), 173. & A.), 75.

tory than the evidence of a non-professional person, above all the evidence of a lady. But Miss Sugden's position is exceptional; of her integrity there can be no doubt; that has been stated with even greater force by those who represent the defendants than by the learned counsel who represents Miss Sugden herself. She was the daily companion for many *years of one of the greatest law- [178 yers that ever lived; who was devoted to his profession; who to the latest years of his life delighted in carrying on his studies in that profession, and who took a pleasure in making plain to non-professional and otherwise uninstructed minds subjects of a somewhat complicated character in which he himself took an interest. Miss Sugden was his assistant and amanuensis in the preparation of the later editions of his works, and she appears to have been always with him upon the many occasions on which he dealt with his testamentary papers and dispositions. . She had therefore, so to speak, a special training, which put her in a position of much greater advantage than a lady under ordinary circumstances might be expected to occupy. In addition to that, she had ample opportunities of becoming acquainted with the contents of this instrument in particular.

The integrity of Miss Sugden, I must remind those who hear me, is not in question; and the value of that admission must not be qualified away by saying that though her integrity is undoubted her recollection may be warped by interest where her statements are specific as to facts, and as to which there is no room for doubt if she be the witness of truth. No bias derived from interest can mislead her as to the number of times when she read, or heard read, the contents of this will, and she says specifically that Lord St. Leonards himself read the will to her on one occasion, that she read it herself at his request on three other occasions, and that on several occasions when he was dealing with his testamentary papers she had the will before her or in her hands, referring to it from time to time in the course of the assistance which she was giving to her father. She had, therefore, ample means of becoming acquainted with its contents. I have now to proceed to examine whether or not, having those opportunities, she has given a correct statement in all, or in part, as to those contents. It is important to bear in mind the manner in which her statement upon this subject was brought into existence. When it was found that the will was missing, she, at the suggestion

of her solicitor, Mr. Trollope, wrote down from memory the contents of the will. She states that she did so, taking precautions against the possibility of anything but her own recollection being infused into her statement. The several [179] papers which were found in the *will box were at that time still in the box locked, and, I believe, sealed, in the presence of the present Lord St. Leonards, and they were only taken from that box after Miss Sugden's written statement had been placed in the hands of Mr. Trollope. She says also that she abstained from consulting any other person, in order that what she wrote might be the result of her own unassisted recollection. Accordingly she wrote down on paper the several particulars with which I shall have to deal. That paper has been properly admitted in evidence, and I shall have to compare it by and by with the more detailed and technical statement which has been embodied in the declaration. I may say in passing that a slight injustice has been done to Miss Sugden by referring to the declaration in the cause, rather than to her original statement, because it has been said, and naturally said, "Is it likely that a lady would recollect all this technical language appearing in the declaration?" That observation appears a just one, but its application vanishes when one looks at the original statement furnished by Miss Sugden, because that is not drawn up with all the technical formality which is now seen in the declaration, but it is written in the manner in which one would expect it to be written by a lady jotting down, as they came across her mind, the various provisions of the missing instrument. In considering what value I shall attach to Miss Sugden's statement of what was contained in her father's will, I have, as I have already stated, borne carefully in mind the fact that she is an interested party; that, above all other circumstances in the case, makes it my duty to see to what extent her statements are corroborated by independent testimony. Let me observe, however, with regard to this corroborative evidence, it is not necessary that I should find corroboration in every particular, and to the full extent of what Miss Sugden has said, before I give credit to her statements. Because that would be, in other words, to say that I ought not to use any evidence standing in need of corroboration unless there were proof enabling me to dispense altogether with the evidence to be corroborated. It is sufficient if I find that independent support is given to Miss Sugden's statements in so many instances that it raises in my mind the conviction that she is to be depended upon even in those matters in

which I do not find corroboration elsewhere. But it is my duty, and I have *endeavored to the utmost of my [180 ability to discharge it, to seek step by step for the corroborative evidence in support of Miss Sugden's statement, in order that I might find what residuum there is for which I have to rely solely and exclusively upon what she says. Now, it has been rightly observed by more than one of those whom I have had the advantage of hearing, that the first source of corroboration to which one would naturally resort would be the instruments of a testamentary character in the handwriting of Lord St. Leonards himself. Taking them in order, and dealing with point after point in which they corroborate Miss Sugden's statement, I find that in the first codicil there is a statement to this effect: "I have struck my pen through so much of my will as provides legacies for life of £50 per annum to every of my three granddaughters Georgina, Ellen and Catherine Jemmett, and the charge thereof on my principal estates devised to my grandson Edward Burtenshaw." That, I say, is evidence in confirmation of Miss Sugden's statement, that the will contained the demise of some estates which the testator there himself calls his "principal estates" to the defendant, the present Lord St. Leonards. It further proves that by that will annuities of £50 to each of his granddaughters, the Miss Jemmetts, were charged on those estates; and I find this passage in the codicil: "And the said life annuities shall be a charge upon, not the estates directed by my will, but upon my Kingsdown estate, in the county of Kent, devised by my will." That proves, therefore, that he had devised the Kingsdown estate to somebody or other, and presumably to some one other than the defendant, since he transfers the charge of those annuities to that estate. Of course, however, this is but a slight presumption, because we know there are many reasons which might influence a person to transfer a particular charge from one estate to another, even though both were to be enjoyed by the same person. Fortunately, the question as to whom he had devised the Kingsdown estate does not rest upon so slender a presumption as that. Now, turning to the second codicil, that is, the one which was afterwards destroyed, and of which we have a copy in the handwriting of Miss Sugden, which has been dealt with upon one side and the other as correctly representing the contents of that instrument, I find this *passage: "I revoke the [181 legacy of £700 by my codicil given to my grandson Edward Burtenshaw, and I revoke all the immediate and reversion-

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any life, in fee, and other interests in my several estates and in my heirlooms in my will devised to my said grandson." That, therefore, proves that he had devised and given the various interests there described, particularly the interests in heirlooms to the defendant; and further it says: "And I direct the payments by my will and first codicil directed to be paid out of Kingsdown not to be so paid, but to be a charge upon and paid out of the estates of which my grandson is by my will made tenant for life." So that I get a step farther in the process of proving what were the contents of the will itself, because he plainly says that Kingsdown has been charged with certain things, and then he goes on to say: "and these payments are the one yearly paid by me for my son-in-law Robert Mann and the three life annuities of £50 a piece which I have given to three of my granddaughters." That legacy further shows that the defendant was only to be tenant for life of the estates which had been devised to him.

The second codicil, as it now must be numbered, shows that Miss Sugden's statement as to the contents of the will is correct in another particular, namely, that he had given a legacy, though the amount does not appear, to one of the trustees named in the will. She says that was a legacy of £200 transferred from the one Mr. Reilly to the other upon the change in the trustees being made. This confirms her to that extent, and to that extent, only, that there was a legacy to one of the trustees. While I am upon this codicil let me touch upon an argument which was pressed with great force by Dr. Deane, as to the effect of the words which are contained in it, namely, "The parts through which I have run my pen I do hereby revoke. In all other respects I ratify my said will and first codicil." Miss Sugden, in her original statement drawn up in the manner I have observed upon, says there were directions about buying small pieces of land out of rents, but these were afterwards struck out. Miss Sugden repeated that statement in the witness-box, but I do not think it was quite understood at the moment. Dr. Deane argues, "How can it be ascertained what were the parts which he had struck out with his pen? It may be that some most important devise or provision may [182] *have been struck out by his pen as recorded here;" but it is to be observed that Lord St. Leonards himself has said in this codicil that the "principal alteration" in his will is "the substitution of another person as my trustee, and as such legatee in the place of the trustee, and as such a legatee in my will." And then he goes on to say, "The

part through which I have run my pen I do hereby revoke." Is it conceivable that Lord St. Leonards should have spoken of the change of one trustee for another as the principal alteration in this will if he had, in fact, struck through with his pen any of the all-important provisions which are really and truly in question in this cause, or is it not rather consistent with what Miss Sugden said at the time, that it related only to these small parts of land which were to be bought out of rents? I come to the conclusion that it is more probable that Miss Sugden is right, and I adopt accordingly the view that he did not with his pen strike through the other provisions, to which I shall have to call more particular attention presently.

The third codicil contains this passage: "By my will I gave to my dear daughter Charlotte £750 for the purpose of building." That supports the statement of Miss Sugden, that the will contained the passage: "I also give her the sum of £750 to enable her, if she so desire, to make an addition to one of the houses devised by me to her." Then the third codicil goes on: "In addition to the legacy thereby bequeathed to her, and which legacy I hereby confirm." It, therefore, proves that, in addition to the £750, there was some other legacy contained in the will for her benefit, though it leaves the amount undetermined, and for that we shall have to rely upon other evidence.

The fourth codicil shows, though it is not of so much importance, that the Boat House Close had not been devised to Charlotte in fee before. The fifth codicil I may pass over. Perhaps I ought to call attention to the fact that the fourth codicil says: "These are in addition to the legacies and provisions made for her by my will and codicils, or any of them, and not since revoked;" showing that there were several things in her favor, but that does not add much force, I think, to the passages which I have already pointed out. The sixth codicil is important, and contains this passage: "I give to my son Frank, in addition to the other *devises to him, my Sutton Scotney Farm, and the [183 manor and village property there to my son Frank Sugden for his life." That proves that there had been some property devised to Frank because he says it is to be in addition. Then he says further: "And I hereby revoke my previous devises of my Tilgate Estate in the county of Sussex, and I devise it to my daughter-in-law Maryanne Sugden." That proves that he had devised the Tilgate Estate, and though it does not prove, it lends support to the theory

that it was, as Miss Sugden said it was, included in the enumeration of principal estates which were devised to the present Lord St. Leonards; but further, it proves, by what follows, another paragraph in Miss Sugden's statement, because it says: "This devise of the Tilgate Estate is to be subject to the conditions in my said will contained for the benefit of the present tenant." Miss Sugden has stated that the will contained this statement: "And I further direct that no trees shall be cut down on the Tilgate Farm Lodge Estate, which has been let on a long lease during the present tenancy, to the annoyance or detriment of the present tenant thereof."

The seventh codicil contains this statement: "I give to my son the Honorable Frank Sugden, for his life, Boyle Farm house and the gardens and grounds and buildings belonging to it, and the two meadows opposite (the fifteen acres and the two acres), and the aits on the Thames; and he is to have the enjoyment, during his life, of the pictures, bronzes, china, plate, marbles, and all articles of vertu and furniture in and about Boyle Farm. And after his death the same shall revert to the uses named in my will, and I revoke any gift in my will, or any codicil contained, so far, and only so far, as it would interfere with these directions. I revoke the gifts in my will contained to my grandson Edward Burtenshaw of my carriage horses and farm horses, and all my carriages and carts, with the trappings and clothings belonging to the same, and all the stabling and garden implements, and all the wine and other spirits of which I shall die possessed, and also my dairy stock and the hay, corn, and stock in or belonging to my stables; and I give the same to my said son Frank Sugden, save and except the sherry given to my daughter Charlotte, and which is to be delivered to her." It proves, therefore, since [184] he revokes that bequest, that it *was contained in the will as alleged by Miss Sugden, who says the testator said: "I give unto my grandson Edward Burtenshaw all my carriage horses," and so on, in similar terms. But, says Dr. Deane, that shows uncertainty of memory, either on the part of the testator or of Miss Sugden, since he gives absolutely, by this codicil, the dairy stock, amongst other things, whereas Miss Sugden says that she was to have two cows out of the dairy stock. But it is to be observed that this is a substitution of a legacy to Mr. Frank Sugden in place of a legacy to the present Lord St. Leonards; and the testator might naturally think, and I for my part should say he was right in thinking, that that bequest to Mr.

Frank Sugden would be subject to the like provision to which the bequest to the present Lord St. Leonards was subject, and which is contained in one of the paragraphs of Miss Sugden's statement, to this effect: "And I also direct that, as she will be beginning housekeeping, she shall have out of my farming stock two cows, to be selected by herself." I should further observe that this seventh codicil confirms Miss Sugden's statement that Lord St. Leonards had left her two dozen of sherry, because he says: "I give the same to my said son Frank Sugden, save and except the sherry given to my said daughter Charlotte, and which is to be delivered to her."

That brings me to the end of the information to be derived from the codicils. I now turn to the papers which appear to me to be next in value to the codicils themselves; I mean those papers, all of them in the handwriting of Lord St. Leonards himself, which were found in the will box, evidently placed there by him to be seen and dealt with in connection with his testamentary papers, and which bear internal evidence of having been drawn up, as Miss Sugden says they were, while he was in the act of preparing his will. She has described the mode in which those papers were used, and I think it clear that they do represent what Lord St. Leonards intended to do at the time when he was drawing the will in question. No doubt, as Dr. Deane has said, they do not in themselves prove that what is there jotted down was embodied in the will; but, having regard to the manner in which they were deposited with the other papers, they lend corroboration, and, as it seems to me, strong corroboration, to Miss Sugden's statement as to the [185 several legacies, particulars of which, in fragments, appear on those papers. In paper "J," the late Lord Leonards has enumerated on the one side the various legacies which he evidently contemplated introducing into his will; and the first is "C. £750," and no one has doubted that that means Charlotte, £750. That, therefore, as it seems to me, is a corroboration of Miss Sugden's statement, that the will did contain this bequest: "I also give the sum of £750." Under the same initial of "C," are the figures £6,000. That, I take it, is a corroboration of Miss Sugden's statement that the will contained this bequest: "I give to my daughter Charlotte a legacy of £6,000, which I direct to be paid out of the policy moneys of £10,000 insured on my life." The next is "S. Cd. 200." That confirms this paragraph in Miss Sugden's statement: "I give £200 to my daughter Sophia Cleaveland, and £100 to her daughter." In the

will as put forward by Miss Sugden, it is £100 to her daughter Sophia, but it does not go on to say anything about a gold watch and chain. There was an inaccuracy with regard to this in Miss Sugden's original statement; but I shall deal with those several inaccuracies by themselves, and therefore now pass on to these several bequests as they appear in exhibit "J." The next is "Aug.," which evidently is intended for Augusta, "£300." Then "Girls, £450." Then "Ht.," which is evidently intended for Harriet, "£200." "Florence, £200." "Juliet P.," which is intended for Juliet Pearson, "£100." And then there is another sum of £200, which is unappropriated by any initial put to it by Lord St. Leonards, but which Miss Sugden says was £200 to her sister Caroline Turner. Then we have "Expenses and debts;" and opposite expenses is "£2,000 Jt." That corroborates Miss Sugden's statement that the will contained this provision: "I further direct that my executors pay the sum of £2,000 to the trustees of the settlement of my daughter Juliet, made on her marriage with Kenneth Dixon, payable by my bond to the said trustees." Her statement explains how that comes to be put down under the head of "expenses and debts" instead of taking its place among the bequests to which I have already called attention.

Now, on the other side is the heading, "Kingsdown F., £300 a year." That corroborates Miss Sugden's statement, [186] that the will *contained this provision: "That if my personal estate should be insufficient for the payment in full of the pecuniary legacies bequeathed by me and to discharge my testamentary and other expenses, until they shall have been fully paid, my son Frank shall only receive £300 a year out of the Kingsdown estate, the rest of the income to be applied to make up the deficiency." There does not only appear, in document J, "F., £300 a year," but there also appears, "Legs." (legacies, that is), as being amongst the charges upon Kingsdown, in addition to the charge which is designated by the letters, "Rt. M., Q. A. B." (which, translated, means, "Robert Mann, Queen Anne's Bounty,") which is a confirmation of Miss Sugden's statement, that this passage was contained in the will: "I further charge my estate at Kingsdown with the annual payment due from my son-in-law the Reverend Robert Mann to Queen Anne's Bounty for the building of the vicarage of Long Watton, in Leicestershire." There, then, is to be found this, "Estates, £150 per annum; three girls." I have looked at the original document, and I must say it

appears to me that there was a word before the word "estate," the word "other." That has not been spoken to by any witness, and therefore it is a matter upon which I have exercised my own judgement. It seems to me to be the word "other," and that has been struck out at some time. If it did stand, as I think it did, "other estates," it would be consistent with what Miss Sugden says was the disposition in the will under this clause: "I give to the trustees of my said will three life annuities of £50 each upon trust as to every of the same for the use of my said granddaughters, and I hereby charge the same on my Childerley Hall and other estates firstly hereinbefore devised." Now, we know that this was put down by Miss Sugden without consulting this document, and without having refreshed her memory; that word, if I am right in supposing it to have been "other" occurring there, would be a corroboration of her statement as to the estates upon which these annuities were charged. In the corner of that document is a note showing that the late lord had made an estimate of what his personalty would be, as to which many observations have been addressed to me. The time when this was added to document "J" has been stated by Miss Sugden to have been later than the drawing of the will, *and it appears to me there is internal evidence of its [187 being so, or at all events that there has been some addition made since. I find, "Edward, £720." I think it has become clear that that legacy was not given, as Miss Sugden supposed, by the will itself, but that it was given, as we now see, by one of the codicils, and I think it is equally clear that it was £700, and not £750. With regard to the £20, I think that is probably not an error, as has been supposed, on the part of Lord St. Leonards, but that it was a computation by him of the proportionate payment of the allowance to the present Lord St. Leonards which he was in the habit of making, and reference to which is contained in the codicil as a thing to be provided for in the event of his death. I may say, in passing, so that I may not have to return to it, that I have not left unnoticed the argument against the value of this instrument, which has been based upon some omissions from it. It has been observed that it does not contain the annuity to the aged person as to which Miss Sugden has spoken. That is true, but it is to be observed that it was not charged upon any particular estate, and therefore, in the order of ideas which appears to have been present to Lord St. Leonards when he made these memoranda, it would not have its appropriate place, be-

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cause it is an enumeration of charges upon Kingsdown and, as I read it, "other estates." Neither could it take its place amongst the legacies, because, as it was an annuity, its exact amount could not be computed; and, further, the lady being of great age, it was probably not treated as a matter of very great importance. But, undoubtedly no reason has been suggested for the omission of the £450 legacy to the Misses Jemmett; that does not appear to have been put down by Lord St. Leonards upon this paper; but it may very well be, that after these various legacies had been put down, it may have occurred to his mind that what he had done for one set of grandchildren he would do for the others, and he may have added it to the will without adding it to the memorandum.

I next come to the document K. This is an enumeration of his several estates, drawn up originally in October, 1867, and to which certain additions in pencil have been made, probably at a later date, the most important thing being the bracketing of "my farm, Style's house and land, cot-188] tages, &c., ditto Crowther's cottage and *land, Wardrop's cottage," and the addition of the words "Charlotte for life," and then the figures £305, representing the exact amount of these rentals. That corroborates Miss Sugden's statement, that the will contained this provision: "I devise to my daughter Charlotte, for her life, my house and grounds at Thames Ditton, at present let to the Reverend F. Style, together with two cottages adjoining thereto, also St. Leonards Farm, together with the house on the said farm at present let to Mr. Lewis, and two small houses," to which she has added a condition to her own prejudice to this effect: "I direct that the said Reverend F. Style shall be at liberty to remain as tenant of the said house and premises during the life of my said daughter," a matter which Mr. Style himself proved the late lord promised him. There remains only one other memorandum in the hand of the testator himself, in which he speaks of the drawings in Charlotte's room as her own, the result of various purchases, and of the harp which was hers long ago, which, therefore, tends strongly to corroborate her statement that the will contained this provision: "I also give to her the harp, which was given to her by me some years ago, and I direct that she shall be at liberty to select and take out of her bedroom at Boyle Farm such ornaments and articles of furniture, many of which have been given to her by her mother and me, or purchased by herself, as she may think fit." I have now exhausted the testamentary, or *quasi* testamentary,

documents in the handwriting of the testator, and I will now proceed to the next class of documents, namely, the letters of the testator himself previous to the making of the will. There is the letter of the 23d of December, 1869, to his son, in which he says: "My dear Frank,—The conveyance to me of the Kingsdown estate is to be executed on Tuesday the 28th. I wish you to come here on the 27th; I intend to make some provision for you out of it. I will explain to you my intention in making a codicil to my will when I see you. I shall probably wish you to go to Kingsdown to take possession of the property, and I want to introduce you to the Rev. Mr. Hooper, who acts as a great authority here, and also to Mr. Flower, the solicitor, to whom I have let the shooting, so that you may be detained several days," and so on. Though, of course, it leaves it as a matter of uncertainty, what was the extent of the provision he intended to *make, it tends, and tends [189 strongly, in my opinion, to support Miss Sugden's statement, that the will did contain the several provisions with respect to Kingsdown in favor of Mr. Frank Sugden, as to which, however, we have further evidence, which I shall deal with presently.

Then there is the letter of the 20th of October, 1870, in which he speaks of the trouble the place is giving him, but which I do not rely upon as evidence, because it was subsequent to the making of the will, and its value as evidence of adherence is small, because it was written at a time so shortly after the making of the will itself. The same observation applies to the letter to Mr. Flower of the 5th of February, 1870.

I now come to another set of documents, which though of less value than those in the handwriting of the testator himself, are yet entitled to very great weight in an inquiry of this kind, namely, to what extent can unsuspected corroboration be obtained from other sources of the statements which Miss Sugden now makes? First, there is the letter of Miss Sugden of the 13th of January, 1870, the very day upon which the will was made. It cannot be conceived that Miss Sugden could then have anticipated such an investigation as this, and was writing down things which were contrary to the truth; they are contemporaneous statements made by her. These documents were properly admitted in their entirety, though, technically, they could only be used to refresh her memory; but they have been admitted, and can be referred to for the purpose of seeing the exact words she then used. On the 13th of January she says: "Papa has

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just finished his will and had it signed, and says his mind is now relieved, and he has not kept it in its old place for precaution sake. He has relieved Kingsdown of some of the annuities, but this is only for you." Observations have been made upon the expression "relieved Kingsdown." Of course, as Kingsdown had only been recently bought, and had not, as yet, been subjected to any actual charge, that would not be technically correct; but Miss Sugden explains it, and I think her explanation may be received without a shadow of a doubt, in this way, that she was there speaking of a change in her father's intentions; that, whereas he had expressed an intention to charge the annuities upon Kings-190] down, he had altered *his mind; and indeed there is other evidence of that. That letter tends to confirm Miss Sugden's statement as to the clause in the will, which says: "I give to the trustees of my said will three life annuities of £50 each upon trust as to every of the same for the use of my said granddaughters, and I hereby charge the same on my Childerley Hall and other estates firstly hereinbefore devised." Thereby showing that he had relieved Kingsdown in the sense of having imposed that charge upon the other estates, instead of, as he originally intended, upon Kingsdown.

The next documents to which I will refer are of the same character, and the same observations are applicable to them as to the letters of Miss Sugden herself; they are the letters from Mr. Frank Sugden to his wife, written while this matter of the will was in contemplation, especially with reference to Kingsdown. Writing upon the 28th of December, he says: "My father has been talking to me all the morning, and the trustees and attorney came to luncheon and to receive money, &c., &c., about the completion of the purchase of the Kingsdown estate, and they did not leave till four o'clock. My father means me to have, by his will, at first three hundred a year from the estate, the rest of the rent will go towards legacies, till they are paid off, and then that part of the rent will come to me also." Therefore there is a distinct statement of what his father had told him of the intention he had in his mind in reference to it, which strongly corroborates Miss Sugden's statement that there was that provision, which I have already read and need not repeat, with reference to the £300 and the legacies. Then Mr. Frank Sugden goes on—"There will also be an annuity of £150 a year on the estate to be paid away." Now that is what I had in my mind when I said there was other evidence that Miss Sugden's explanation of the word "re-

lieved" was correct; because we have Frank Sugden here writing to his wife, and saying that the annuities of £150 were to be charged upon Kingsdown. Lord St. Leonards appears to have changed his mind and to have relieved Kingsdown, and to have transferred those annuities to the other estates. Then Mr. Frank Sugden goes on, after stating what his ideas and expectations are as to the duration of the annuities and other charges—"and then the whole estate, free from everything except repairs, would belong to our *eldest son after my life. My father intends [191 in the spring to begin to put the estate into repair. I go down there to-morrow, and I suppose that I shall return here on Thursday. It is possible that in my lifetime the estate may become valuable to us, but it removes from us anxiety about Frank being able to work earnestly in a profession for his own livelihood. The estate would go to him, and after him to his brothers (if he had no children) and supposing none of them lived the estate would go to the peerage, just as the estates of the peerage would come to our sons if their cousins did not live." That is evidently a statement of what he had just learnt from Lord St. Leonards as to his intentions. I need not go through them in detail; but to the mind of a lawyer it will be at once obvious that that which was contained in a whole series of dispositions, as stated by Miss Sugden as being in the will, was stated by Lord St. Leonards to his son Frank as his intentions with regard to the Kingsdown estate. Then, in his letter of the 1st of January, he says that his father had said to him—"I see one thing that the charges upon the estate will not last long, and then you will be a lucky man." And he goes on to say—"But do not mention this to Sophy, nor yet to Phil, for the will is not altered at present, though he told the former trustees of the property that it was not intended for the peerage, and gave them to understand that it was for me. He also has informed Edward that it was not for the peerage, and that this is irrevocable, but Charlotte says that I have been so unlucky she will not be easy till the will is made." Here is a direct statement not only that Lord St. Leonards had informed his son Frank of these provisions with respect to Kingsdown, and the devolution of the estate for some generations, but also that Lord St. Leonards informed him that he had told the present Lord St. Leonards of these dispositions, and that they were irrevocable. Of course the word "irrevocable" we know would not be used in the sense of its being impossible for his intention to be changed, but in the sense that his intention was

that the present Lord St. Leonards must forever dismiss from his mind the idea that Kingsdown was to come to him. Upon this point it is to be remembered, that the present Lord St. Leonards could not contradict this statement; he has not been called as a witness, and it must be accepted, 192] and I *do accept it, without doubt. I have gone minutely and somewhat painfully through these various sources of corroboration of Miss Sugden's statement, and let me now state what is the result. In the first place, I will deal with the errors which appeared in Miss Sugden's original statement, as compared with the statement which she has since put forward, the latter statement being based upon the information which she has since had as well as ourselves. In the original statement she prefaced her enumeration of the various legacies to the members of the family in this manner: "Legacies of sums varying from £150 to £300 were left as tokens of love to different members of his family, and were, as nearly as I can recollect," and so on; so that she indicated that this was a matter as to which there was not an absolute certainty in her mind, as there was in relation to the more important things. In making that enumeration she has fallen into these errors (if we are to accept, as I do accept, exhibit J as a better guide than her memory): She has put down in her original statement £200 to the daughter of Sophia Cleaveland, instead of £100, as it appears in Exhibit J. She has put down £200 to Augusta instead of £300, and there is £100 to Juliet Pearson, which is omitted; and in the enumeration of the daughters of Mrs. Reilly she has mentioned the names only of two, namely, Emily and Winifred, whereas there should be another, Kathleen. She has put down Kingsdown as being subject to a charge of \$350 to Frank, whereas, according to exhibit J, it should be £300; and, further, she has made the mistake of transposing the legacy of £700, as we now know it was to the defendant, from the codicil to the will itself.

Now, having regard to the nature of these bequests or devises, and provisions, it appears to me that that is a very small amount of error to have crept into a statement of this kind; but no doubt it is argued, and properly argued, that error being shown in some particulars, it leaves the mind in uncertainty whether or not there may be error in others. Granted that one should use the fact that there are these errors with reference to other things as to which no corroboration can be obtained, yet surely the fact that some errors appear should not lead me to reject Miss Sugden's evidence in those cases where the accuracy of her memory is confirmed

by the other documents, especially documents of such value as I think *these that I have referred to are entitled [193 to be considered. I take it that, on the whole, the result of this examination has been to show that Miss Sugden's memory is a very tenacious and accurate one, and that it may be safely relied on even in matters where she is not corroborated, if from the nature of the case I think it is unlikely she should have fallen into error in respect of those other particulars. Now let me show what portions of Miss Sugden's statement have not been corroborated in the course of the investigation I have gone through. In the first place, she mentions the names of the trustees. There has been no corroboration of that; but that is a matter of small importance, and nobody could doubt she is accurate as to it. Secondly, there is the enumeration of the principal estates. There has been nothing to show, besides her statement, what Lord St. Leonards meant by it; but that is a matter of fact upon which we can arrive at a pretty safe conclusion without any corroboration. There has been nothing to show that the fire insurances were to be kept up by the trustees. There has been nothing to show that the two cows and twenty-four plants were left to her. There has been nothing to show that Boyle Farm was to be kept up for a month, and nothing to show that the annuity for the aged person was provided for by the will. There has been nothing to show who the executors were, or what was the amount of the legacy to one of the trustees, although there is a corroboration of the statement that there was a legacy of some amount to the trustees. Then there is nothing to corroborate her statement of the £150 to the three Miss Jemmetts. There is nothing to corroborate her statement that Caroline Turner was the person to whom the unappropriated £200 was left. There has been nothing to corroborate her statement with regard to the provision for the servants' wages, or with regard to the provision as to funeral expenses and manner of funeral. These, I say, have not been corroborated by any independent evidence, but they are matters really, with the exception of perhaps the \$150 to the Miss Jemmetts, of so trifling a character that they stand in need of no corroboration. There remain, however, two undoubtedly most important clauses in the will as put forward by Miss Sugden, as to which there is no independent evidence and no corroboration; I allude to the bequest of the residuary estate and the devises of *the estates in the event of the failure [194 of the several limitations. There is no doubt that those are most important portions of the will, and the question which

I have now to determine is whether, in the absence of such corroboration as I have sought for, and as I think I have found, for all the other important provisions, I am to hold that Miss Sugden's memory is to be relied upon as to these.

Now there is much force in the arguments that have been addressed to me by Mr. Thesiger with reference to the several legacies which are left to the various members of the family. He has pointed out that to two of these ladies who are said to have been the residuary legatees, together with Miss Sugden, there are bequests to the one of £300 and to the other £200, before we come to the residuary clause. No doubt it is a subject of observation that trifling legacies of this kind should be given to persons who were to take so large a benefit as we have heard by a third of the residue; but Mr. Thesiger has candidly said that this is only one element in the consideration. It is obvious that the process Lord St. Leonards was going through when he drew up paper J, was to jot down the various persons whom he desired to notice in his will, to show that he had not forgotten them, and was leaving them what has been termed complimentary legacies. It may well be that after he had put down those various small legacies, he then began to consider in this way: "Having remembered all, or nearly all, the members of my family in various ways, leaving them small sums or articles in token of my affection, what shall I do with my residue?" And then exercising a choice and selection, which he was entitled to do, and with the motives for which we have no concern, he fixed upon these three of his daughters, to the exclusion of the others. All I can say upon the subject is this, that the result of this examination has been to give me such confidence in the accuracy of Miss Sugden in all important matters, that I think her memory is to be relied upon, although it is not corroborated with regard to the residuary bequest. The observations which are applicable to these several errors which I have pointed out, are not applicable to so important a matter as the disposition of the residue. It is a subject which of course would be calculated to attract Miss Sugden's attention. It is a [195] *matter in which she would be deeply interested, not only for herself, but also for her sisters; as well those who were to take a benefit with her, as those who were to be excluded from it; and since she says she has a distinct recollection that it was she and her two sisters who were the residuary legatees, I come to the conclusion that she is to be relied upon, and I find as a fact that that was the bequest with reference to the residuary estate.

This brings me to the end of the observations which I have to make upon the subject of the contents of the will, with the exception, indeed, of the bequest which Miss Sugden alleged there was to Lord St. Leonards. That, I have said, I should allow the amendment of. I find, therefore, as a fact, that the contents of the will were as set out in the declaration, with the exception of the bequest of £750 to the present Lord St. Leonards; and I direct that an amendment be made by striking out so much of the statement contained in the declaration as relates to that bequest.

I now pass on to the second branch of the case, namely, whether or not this will has been revoked by the testator himself? This is a question of fact. Undoubtedly where a will is shown to have been in the custody of a testator, and it is not found at his death, the presumption, in the absence of evidence to the contrary, is that the testator himself destroyed it. But that presumption may be rebutted by evidence leading to the conclusion that the testator did not do that, which, in the absence of evidence to the contrary, it is presumed he had done. That evidence must necessarily be of great variety according to the various circumstances of the cases that are presented to courts of justice. Sir Henry James has argued that there was some particular standard which must be attained by the evidence in order to justify the court in acting upon it; but I have not been able to collect from his very able argument, or from the other arguments which have been addressed to me, what that particular standard is. It must necessarily vary according to the circumstances of the case. I have already said that the first element in this consideration of whether or not a testator has destroyed his will is to be found in the instrument itself. I must now, for the purposes of the rest of my *observations, take it as proved that the contents of [196 the will were as Miss Sugden says they were. Well, then, this appears to be a will well considered, dealing with the interests of a large number of his family, settling certain estates upon the peerage, settling other estates upon his second son, accompanied by declarations of the testator to those interested, especially to the present Lord St. Leonards, that what he was about to do was the fixed determination of his mind, and I have to consider whether it is probable that he would at some subsequent time change the intentions which he had then formed. When it is suggested that such a change has come over the mind of the testator

we must look for the cause of such a change. Was there any in this particular case? It appears not only from the parol evidence, but it appears from the various codicils, that Lord St. Leonards ceased to entertain as strong an affection for his grandson, the present Lord St. Leonards, as he did presumably entertain at the time of the making of this will. He thought, and we have nothing to do with the justice or injustice of his reasons for so thinking, that he had to complain of his grandson's conduct. I have already said, and desire emphatically to add to that which has been stated by the various counsel in the case, that having had some opportunity beyond what has been openly stated in court, by reading certain letters, of knowing exactly what were the causes of Lord St. Leonards' displeasure with his grandson, there is nothing in those causes which in the least degree reflects upon the defendant's character. There were differences of opinion which might naturally be expected to arise between a young man of twenty-three and an old man of nearly ninety. But of course we have nothing to do with such considerations as that; Lord St. Leonards was entitled to act upon his own view of what was right and proper or expedient for his grandson to do in reference to any matrimonial engagements.

Let me continue and conclude this portion of the case in reference to Lord St. Leonards' feelings towards the defendant. It does not appear that there was any reason why Lord St. Leonards should change his views, because, although it has been stated that the second engagement of the defendant was broken off in the year 1874, yet it does not [197] appear that it was ever communicated *to Lord St. Leonards, or that it occurred at a time when, as I shall show presently, it will be necessary to show it did take place if we are to take it into account as having influenced Lord St. Leonards' mind. On the other hand, we find his affection for his daughter, Miss Sugden, naturally increasing with the months and years. As he became more and more dependent upon her so did he become more and more anxious to show the gratitude that he entertained towards her.

Also with regard to his son, Mr. Frank Sugden, he never had any difference with him, and the codicils show that he desired more and more to benefit him, and to make him, as Miss Sugden stated he said he would do, the head of the family, by placing him in Boyle Farm, with a sufficient income to maintain it. There is, therefore, a total absence of assignable motive for Lord St. Leonards revoking the all-

important provisions of the will of 1870. I am not now dealing with small matters, but I will take, for example's sake, the disposition of Kingsdown in favor of Mr. Frank Sugden. It seems to me impossible that anybody can doubt, however his interests may bias his views, that that will of 1870 contained the disposition which Miss Sugden says it did, of Kingsdown in favor of Mr. Frank Sugden, and his first and other sons in succession in tail male; and I presume I am not asked to doubt the fact that it contained the several dispositions she has mentioned with reference to the peerage estates. Why then, at any time afterwards, can it be argued, should Lord St. Leonards make any change in the disposition in favor of Frank? He, it is true, had given him another estate by one of his codicils, and that he had also given him Boyle Farm, in order that he might assume the position of the head of the family; as to Boyle Farm, though it might be probably let for a considerable sum, it is not probable that was the view with which Lord St. Leonards left it to his second son; and if it was to be used as he had used it, as a residence, then no doubt, it is a place which would cost much to keep up, and which would require a considerable income properly to maintain it. I think, therefore, there are reasons why Lord St. Leonards should do as Miss Sugden says he did, namely, leave unaltered the disposition of the other estate to Mr. Frank Sugden, in order that he might maintain the *posi- [198 tion of head of the family at Boyle Farm. Now, in the absence of any reason why Lord St. Leonards should change his mind in reference to Mr. Frank Sugden, what is there in the evidence to show that he ever did change his mind? There has been given a considerable body of testimony as to his subsequent statements, which upon this part of the case are, without doubt, admissible in evidence. It has been shown that down to the latest period of his life when he had conversations upon such subjects, he invariably spoke of Kingsdown as having been left to Mr. Frank. In January, 1874, Miss Sugden states that there was a conversation upon the subject, in which the peerage estates were referred to; Kingsdown as going to Frank, and Tilgate, to his grandson Henry; and also as to the property that had been given to Miss Sugden herself. This appears to me to be an exceedingly important conversation; it shows a natural course of thought in Lord St. Leonards' mind upon the subject of his various estates, because Miss Sugden says it arose *à propos* of a then contemplated measure of land transfer. Lord St. Leonards spoke of the

difficulties in the way of acquiring and dealing with land being exaggerated, and he said by way of illustration: "In the case of my own family, there are no less than four of you who are in possession of land, there are the Peerage Estates, Kingsdown for Frank, Tilgate for my grandson Henry, and your nice little property." That, as I say, shows not only a clear adherence to the will as Miss Sugden says the will was drawn, but it shows this was not a wavering state of mind upon Lord St. Leonards' part; it was a distinct statement by him with discrimination as to the manner in which his several properties would pass. And the circumstances under which it arose appear to me to give it greater credibility. It is a perfectly natural way in which such a conversation would arise between father and daughter; and trusting as I do, completely, to the integrity of Miss Sugden, and so excluding the possibility of invention on her part, it appears to show most satisfactorily that in January, 1874, he believed that a will by which Frank would take the Kingsdown estate, was in existence. Mrs. Turner also says, that in November, 1874, which is still later, and approaching the time of Lord St. Leonards' death, her father said to her, Kingsdown would be a nice 199] place for his son *to live in. That is a plain allusion to the devise, which, as I have said, I find as a fact, was contained in the will. I pass over those several witnesses who spoke to conversations at an earlier period. Mr. Frank Sugden himself must be passed over on this head, since he does not speak to any distinct conversations upon the subject of Kingsdown subsequently to May, 1872, although he says, generally, there was never anything at any time which led him to suppose that there had been any change in his father's intentions towards him. Hobson, the gardener, who was a witness in a different class of life, gave his evidence to my complete satisfaction. I certainly believed he was speaking the truth; and he also gives an account of a conversation arising in a perfectly natural way; he says, in May, 1874, when he had occasion to go to Lord St. Leonards' bedroom to consult him about some gates which he was to put up for Miss Sugden's house, Lord St. Leonards then spoke not only of the house for Miss Sugden, but he spoke of Kingsdown for Frank, to which the witness says he made answer: "Yes, my Lord, you have told me that before." Lord St. Leonards appears to have been in the habit of making these statements to the persons who were about him; it being a subject in which he took naturally a great interest. Then Carroll, who came there only in Janu-

ary, 1874, says he had many conversations with Lord St. Leonards, in which Lord St. Leonards alluded to Frank in connection with Kingsdown as his future property. Elizabeth Fryer, who came in February, 1873, says that Lord St. Leonards, when she was in conversation with him whilst in attendance upon him, frequently said that he had left Kingsdown to Frank. Northwood, the nurse, who came there on the 12th of March, 1874, says he said, "Kingsdown is my estate at present;" and she says he said (because it is important to notice the peculiar expression this witness made use of) "but I have given it, or rather shall give it to my son Frank, and to his son after his death." That expression—"or rather shall do so," I suppose, though it has not been touched upon, might be alluded to as indicating an intention in future. I, however, come to the conclusion, that it refers to the fact that he had done it by will, and that the property continued his at present, meaning to exclude any notion that he had actually given it to his son.

*Now these conversations, these statements and [200 declarations, which I have referred to are all, as it will be seen, late in the testator's life; the first that I have mentioned being in January, 1874, and the others coming down to within a few days of his death, and at many times between those two dates. This has a most important bearing upon the question of whether the testator had revoked the will or not, because it is to be remembered that this will was in the will box, kept in the saloon which the testator was in the habit of using as his sitting room; that the will was actually seen by Miss Sugden on the 20th of August, 1873, that on the 20th, or about the 20th (it is not material to a day) of the following March, Lord St. Leonards took to his room, and never quitted it again until he died, during which time the will box was in Miss Sugden's custody in her room, and therefore it was in such a position that Lord St. Leonards could not have access to it. Therefore, seeing that the will was in existence in August, 1873, and that he could not have had access to it after March, 1874, the period of time during which he could have revoked it is limited to those months; and, indeed, it is further limited in this respect, that Lord St. Leonards was taken ill in September and went to his room for a few days; he was taken more seriously ill about the 1st of October, and kept his room until about the 22d or some later day in December, before Christmas Day, during which time, also, in addition to his not being able to have access to this will box, since he was in his room, Miss Sugden had taken possession of it and

carried it to her own room. There is, therefore, a still shorter period during which it is possible to conceive that Lord St. Leonards obtained access to the will and destroyed it. But, as I have shown, in January, 1874, he distinctly alluded to the contents of the will, and on those several occasions down to the time of his death he alluded to that main provision which I have taken as an example, the devise to Mr. Frank Sugden and his family.

Now, before I comment upon that, and the inference I draw from it, I will rapidly touch upon the statement made in relation to the residuary bequest. Miss Sugden refers to the several occasions, during the year after the making of the will, when he referred to it, notably in May, 1872, when he 201] offered to give her *Boyle Farm, and she then said the residue was given to her and her two sisters, to which he made no objection. That would be an adherence, with less force no doubt, but still it would be evidence of adherence that he made no objection to such a statement on her part. Then Miss Sugden says, that in November, 1874, there was a distinct conversation with regard to the residue, in which she said it would be about £10,000 a-piece, to which he answered that was what he wished exactly; and when he received his pension he said it would be a nice addition for her and her sisters; and on the latest occasion when he received his pension, within a few days of his death, he repeated that which Miss Sugden says was a common phrase on his part, that he was pleased so much was coming to her and to her two sisters; and that allusion was made to the residuary bequest in her favor and that of her sisters as late as January, 1875. Mrs. Turner's evidence upon this point is undoubtedly not of great value, because it only amounts to this, that the testator spoke of having left her, Mrs. Turner, very well off. Certainly, if that alluded to the legacy of £200 it would be an absurdity, and he must therefore have alluded to something more important than that legacy. She also says that he said Miss Sugden would be well off. Those are, however, general expressions, to which I do not attach much importance, because no doubt, as has been argued so forcibly, there would be a considerable sum coming to Miss Sugden, which the testator might think, added to her £6,000 legacy (if it is to be taken there was such a legacy), would make up a very handsome sum. The evidence of Hobson does not touch this point, because it is only as to general expressions on the part of Lord St. Leonards as to Miss Sugden being well off. Isabella England, the nurse, says he said he had provided for her future

residence, and had provided well for her along with it. With regard to his continuing affection for Miss Sugden it is well to turn to the evidence of Elizabeth Fryer, who gives a somewhat touching narrative of what occurred quite late in his life when alluding to his daughter. I will not take up time by reading the passage, but it is one in which he prayed that she might be blessed for all the kindness she had shown him, and concluded emphatically by saying, "And she shall be blessed." The nurse Northwood said that he said he had provided for Miss *Sugden, and [202 she would be very rich after he was gone. I have now gone through all these passages which Mr. Thesiger has referred to; and it is due to the argument which he has urged before me, to say that my examination bears his out, that in none of the declarations is there a distinct statement with reference to the residue; it is all contained in those general words I have referred to, there is nothing more specific with regard to the residuary bequest. But, as I say, of his unceasing and his growing attachment for Miss Sugden down to the last there can be no doubt.

There remains this state of things for me to deal with: evidence, which I accept as true, that down to the latter months of his life, and long after it was possible for him to have access to the will box or the will, he was expressing his adherence to the devise of the Kingsdown estate to Mr. Frank Sugden, which, as we know, was contained, and contained only in the will of 1870. There are these allusions, such as they are, to his having benefited Miss Sugden and her two sisters; there are the general expressions with regard to her, and, further, there is the fact that he alluded to the annuity in favor of his brother's widow, which he had been paying for forty years, and which he desired should be continued after his death, concerning which there seems to have been some degree of secrecy, since he did not put the name into his will; he referred to it as being something that he had done, and which it gave him satisfaction to think he had done. These statements lead me to the conclusion that at the time when they were made by the testator, he believed that his will of 1870 was still in existence. But it is said, if that is the case, what is the theory which is to be put forward as to the disappearance of the will? I am not called upon to suggest any theory which would account for the will not being found at the testator's death. Several theories of various degrees of plausibility might be suggested, but I carefully and purposely abstain from putting forward any theory of my own on the subject. It is

sufficient for me to say that believing, as I do, the testator made these statements, showing a belief in his mind that the will was in existence at a time subsequently to that at which he could have revoked it, I am led to the conclusion that he had not, in fact, revoked it at any time when he had the opportunity of getting access to it. To adopt any 203] other view would be *to hold one of two things which appear to me to be equally untenable, either that Lord St. Leonards had in fact destroyed the will upon one of the occasions upon which, no doubt, he might have had access to it between August, 1873, and March, 1874, but that he had forgotten he had done it; or, on the other hand, I must assume that, having done it, he, who through so many years had made Miss Sugden the confidante of all his thoughts and all his business transactions, purposely concealed from her the fact that he had done an act so much to her injury, while he kept up the semblance and pretence of an undiminished affection and interest towards her, which would be inconsistent with the idea that he had done anything so greatly to the detriment of the position in which he had placed her. Equally unlikely is it to be observed that he would, under those circumstances, have kept concealed from Mr. Frank Sugden the fact of the great change in his prospects and the prospects of his family which had been worked by a revocation of this will. In addition to that, it appears to me wholly impossible to believe that Lord St. Leonards, with his knowledge upon such subjects, with the pride which he manifested in doing things as he thought in the right way, even to vanity, should have destroyed this will, knowing, as he must have done, the confusion he would throw his affairs into, and the certainty there would be of bringing about that litigation which he so frequently expressed a desire to avoid. If I were to accept the theory that he took out this will with the idea of altering it, I should then rather come to the conclusion that, with the idea of altering it, he had lost it, having so taken it out, rather than that he had taken it out to destroy it. That he, having made this disposition of his property, should take out the will and destroy it, without substituting in its place any other disposition, above all that he should keep that destruction concealed from all those about him, is what I cannot believe. Having now resting upon me the responsibility of coming to a conclusion upon this question of fact, I come rather to the conclusion that his declarations down to the latest period of his life show that he died under the belief that that will

was still in existence, and rebut the presumption that he had revoked it.

Now let me, in conclusion, call attention to a passage in Lord *St. Leonards' own work which has a bearing [204 upon this subject, and it shows how the wisest of men may be mistaken, as I think, in the advice which they give to others. I may also say this case illustrates the false security in which Lord St. Leonards lived, and in which I dare say almost all of us live. He and the other members of his family believed that this will was secure from the hands and eyes of either the curious or dishonest. It was thought that the only means of access to it was by the use of the key which Lord St. Leonards carried about him, and that there were no means of access to any other key which would open the box, whereas in fact it turned out that there were no less than four keys in that house by which anybody so minded might have opened the *escritoire*, and so have obtained access to the key which would open the will box. I was about to call attention to what Lord St. Leonards says upon another subject. Believing as I do that this will has been lost, and not destroyed by the testator's hands, that the loss has arisen from the insecurity of the custody, safe as it seemed to all concerned, in which it was placed, it is well that it should be known—and I particularly desire that it should be made public—that the law has provided a means of obtaining as nearly a certainty as can be obtained in human affairs, that a will will be forthcoming at the death of a testator, because it has been provided by 20 & 21 Vict. c. 77, s. 91, that wills may be deposited at the registry of this court, sealed and sacred, so that their contents will never be known to any one until the proper time arrives, namely, the death of the testator. Upon the payment of a small fee, as I have said, wills may be deposited at the registry of the court, and there kept with almost certain security until the proper time arrives for the opening of them; yet I regret to say that, during the year 1872–73, there were only seven instances of this opportunity being made use of. During the year 1873–74 there were nine cases; in the year 1874–75 there have been seventeen instances. Lord St. Leonards, observing upon this, says, in his *Handy Book on Property Law*, p. 261, the act which establishes this court “provides not only for the custody of your will after your death, but directs that convenient depositories shall be provided, under the control of the court, for all such wills of living persons as shall *be deposited therein for safe custody, [205

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and that all persons may deposit their wills in such depository upon payment of such fees and under such regulations as the judge of the court shall by order direct. If you are likely from time to time to alter your will, I should advise you not to place it in this depository, for the will deposited must remain there until your death." I think it is to be regretted that that advice was given, because if a will is deposited at the registry it still would be open for anybody to alter his will.

That brings me to a conclusion of the observations I have to make; and the result is that I find, as a fact, that the will of 1870 was duly executed and attested; that the several codicils were also duly executed and attested; and I further find that the contents of the will were as set out in the declaration, with the exception I have mentioned. That brings to a conclusion the duties which I have to discharge in this case to-day.

On the 7th of December, an *ex parte* application was made to the court on behalf of Lord St. Leonards to extend the period of fourteen days, limited by the Probate Court Rules of July 30, 1862, for applying for a rehearing. The court enlarged the time to the 14th of December, and on that day, no application for a rehearing having been made,

Hawkins, Q.C., moved the court to pronounce for the contents of the will as contained in the amended declaration, limited until the original or a more complete copy should be found, and also of the eight codicils.

SIR J. HANNEN (President). There is a demurrer on the record, and the matter must stand over until the demurrer is disposed of.

Dec. 21. SIR J. HANNEN (President) delivered the following judgment:

On the trial of this cause I disposed of the issues of fact. No question of law arose on that occasion. I found the several issues in favor of the plaintiffs, and I am now asked, on the basis of those findings, to pronounce for the 206] will and codicils propounded. *The defendants have appeared by counsel and formally opposed the plaintiffs' application, but no reason has been suggested why my decision upon the facts should be set aside, or why I should not make the decree prayed for.

I have, however, first to dispose of the demurrer to defendants' 5th plea. That plea is as follows:

"That the said codicils respectively were intended by the said deceased to be dependent upon and operate in con-

junction with the will in the declaration mentioned, and to have no force or effect apart therefrom, and together with such will to form, and does form, one complete testamentary instrument and disposition, and that the said deceased duly revoked the said codicils respectively by destroying the said will with the intention of revoking the said complete testamentary instrument and disposition."

The plaintiffs demurred to this plea, on the ground that it does not aver that the codicils have been revoked in any of the modes indicated by 1 Vict. c. 26, as the only modes by which testamentary papers can be revoked. I have found that the plea was not proved in fact. As the demurrer has not been argued before me, I do not think that I am called upon to give my reasons in detail for the judgment I am about to pronounce, and I shall confine myself to the simple statement that, in my opinion, the plea is good in law. I therefore overrule the demurrer, and pronounce for the will and codicils propounded.

With regard to the costs of the suit, I think that the loss of the will must be regarded as a misfortune which rendered this litigation necessary; and I therefore allow the costs of the defence out of the estate, but I see no reason for departing from the ordinary rule of the court that one set of costs only be allowed, as the interests of the several interveners, though different, were not conflicting with those of the defendants, and did not require different evidence, if evidence had been given in opposition to the will or codicils, or call for different arguments.

The order made on the 25th of November (so far as material) was as follows: "This court doth order that the declaration *filed in this cause be amended, and, the [207 same having been amended at the sitting of the court, this court doth find that the Right Honorable Edward Burtenshaw, Lord St. Leonards, the deceased in this cause, made and duly executed his last will and testament, bearing date on or about the 13th of January, 1870, and that the contents thereof were in substance or to the effect set forth in the third paragraph of the declaration as amended; and that the said deceased also made and duly executed eight codicils to the said will" (mentioning their dates), "the said will and codicils having been propounded in this cause on behalf of the plaintiffs, the executors therein named, and that the said will and codicils were not, nor were either of them, revoked at the death of the said deceased."

The decree or order made on the 21st of December, 1875,

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was (so far as material), as follows: "It is ordered by the court that the demurrer of the plaintiffs to the 5th plea of the defendants be overruled, and pronounced that the said 5th plea was good in law and, on the application on behalf of the plaintiffs for a decree, this court doth pronounce and declare for the force and validity of the last will and testament of the Right Hon. Edward Burtenshaw, Lord St. Leonards, the deceased in this cause, bearing date on or about the 13th of January, 1870, and for the contents thereof as in substance or in effect set forth in the third paragraph, as amended, of the declaration filed in this cause on behalf of the plaintiffs, and also for the force and validity of the eight codicils to the said will."

On the 20th of January, 1876, the testator's grandson, Lord St. Leonards, and his brothers and sisters, gave notice of appeal from so much of the judgment and decree of the President of the Probate Division as pronounced for the force and validity of the will of the 13th of January, 1870, and for the contents thereof, as in substance or in effect set forth in the declaration, and for the force and validity of the eight codicils.

An appeal was also brought by Mr. and Mrs. Henderson. The appeals came on to be heard on the 7th of March, 1876. On the opening of the appeals,

Hawkins, Q.C., Inderwick, Q.C., and Dr. Tristram, for 208] the plaintiffs, *took the preliminary objection that there could be no appeal from the finding of the Probate Court on the questions of fact.

The appeal must be limited to questions of law arising upon the decree pronounced on the 21st of December, the previous finding of the President on the 25th of November being taken as conclusive. That finding is like the finding of a jury; it is conclusive, unless the proper steps have been taken to set it aside. The proper course would have been to apply to the judge for a rehearing under Rule 60 of the Probate Court Orders of the 30th of July, 1862, which rule provides that "An application for a rehearing of a cause heard before the judge without a jury, and in which evidence has been given *viva voce*, may be made by motion within fourteen days from the day on which the same was heard." Rule 89 enables the court to extend the time for making the application. Here the plaintiffs applied for and obtained an extended time, but they made no application for a rehearing within the extended time—s. 35 of the Act (20 & 21 Vict. c. 77), regulates the mode of trial, and s. 39 gives a right of appeal to the House of Lords.

By the Judicature Act of 1873, the jurisdiction of the Probate Court is transferred to the High Court of Justice, and s. 22 of that act provides that causes pending when the act came into operation shall be continued in the High Court and the Court of Appeal according to the old or the new procedure as the courts may think fit to direct. Under this section the President of the Probate Court made an order that pending causes should be continued according to the old practice. Then s. 18 of the Judicature Act of 1875 provides that the Rules and Orders in force in the Probate Court at the commencement of the act are to remain in force in the High Court until altered or amended. Section 19 of the act of 1873, it is true, provides that the Court of Appeal shall have power to hear appeals from any judgment or order of the High Court (with certain exceptions), but this finding on a question of fact is not a judgment or order of the court.

[MELLISH, L.J.: Order LVIII, Rule 14, of the Rules of the Supreme Court, provides that "no interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the *appeal as may seem [209 just." The object of this was to prevent parties being prejudiced by their having omitted to appeal from an interlocutory order. The whole thing was to be open on the merits before the Court of Appeal. We have held in several cases that, till an appeal is brought, there is nothing pending in the Court of Appeal.]

But our contention is, that the finding on the facts is not an order of the court at all.

[JESSEL, M.R.: All orders made by the judges of the Court of Chancery were made in this way, and yet it was never doubted that an appeal could be brought from their decisions both on the facts and on the law.

JAMES, L.J.: Your argument is that the verdict of the judge is binding to the same extent as the verdict of the jury would have been if the cause had been tried by a jury.] That is our argument.

[COCKBURN, C.J.: At present I fail to see any distinction between the findings of fact when made by a jury and when made by a judge.

JESSEL, M.R.: I understand Rule 60 of the Probate Orders to be only potential. It does not say that if no application is made for a rehearing the parties are finally bound.]

Then Order XXXIX, Rule 1, of the Rules of the Supreme

Court provides that, in order to obtain any new trial of any cause tried in the Queen's Bench, Common Pleas, or Exchequer Divisions, an application must be made for the purpose to a Divisional Court. This rule does not apply in terms to the Probate Division, but the Probate Court rules remain in force. *Tommey v. White* (1) supports our contention, and so does *Fernie v. Young* (2). In that case questions of fact had been tried before a Vice-Chancellor without a jury. He made certain findings of fact, and his decree, dated some days afterwards, referred only to the findings and not to the evidence upon which they were based. It was held that the House of Lords could look only at the decree, there having been no motion for a new trial. In the present case the appeal is against the decree only; there is no appeal from the findings.

[JAMES, L.J.: If there had been a change of the individual *judge between the finding of the facts and the subsequent decree, the new judge would have had to base his decree upon the findings of his predecessor.

COCKBURN, C.J.: If a case were tried at the assizes, as is often done, by a judge without a jury, and an application were afterwards made for a new trial on the ground that the finding of the judge was against the weight of the evidence; if the court thought the finding of the judge wrong, still it could only order a new trial.

MELLISH, L.J.: In the Court of Chancery there was always an appeal on the facts as well as the law. Now, the same rules apply to all the Divisions of the High Court. If, then, we accede to your argument, shall we not, in effect, be holding that there is no longer any appeal from a decision of a Vice-Chancellor on a question of fact?]

Our argument is founded mainly on the Probate Court Rules, which, we say, remain in force. Rule 60 provides for a rehearing only when the evidence has been given *viva voce*. If the evidence had been given by affidavit there would be no object in having a rehearing by the same judge, because the written evidence would come before the Court of Appeal just as it did before the judge at the original hearing, whereas in *viva voce* evidence a great deal depends on the demeanor of the witness.

Sir H. Giffard, S.G. (Dr. Deane, Q.C., and Bayford, with him), for Lord St. Leonards, and some of his brothers and sisters. The Court of Probate, like the Court of Chancery, had jurisdiction to try questions of fact without a jury. In the courts of common law this was not so; the issues of

(1) 6 Cl. & F., 786.

(2) Law Rep., 1 H. L., 63.

fact were found by a jury, and the courts determined the questions of law. The consequences of this was, that in the Court of Chancery appeals, or rather rehearings, could be had of decisions in questions of fact, and the Court of Probate stood in a similar position. *Fernie v. Young* (') depended entirely upon the provisions of the Chancery Amendment Act, 21 & 22 Vict. c. 27.

[JAMES, L.J.: The judges of the Court of Chancery exercised a larger discretion as to directing a new trial than a judge at common law could do.

*JESSEL, M.R.: The judges of the Court of Chan- [211] cery acted without reservation by the judge at the trial, because it was their own issue.]

Under the Chancery Amendment Act the judge was expressly placed in the position of a jury, and his finding in that character was binding in the same way as that of a jury would have been. Under the Probate Act and Rules, no issues are directed when the judge hears the case without a jury. The 59th rule of the Probate Court Orders provides for a new trial of an issue tried before a jury; the 60th rule provides for a rehearing of a cause which has been tried by the judge himself. And now under the Judicature Acts and Rules all the decisions of all the Divisions of the High Court may be appealed from. The decision of the judge on the facts was a decree in the cause. The only reason why the final decree was not at once pronounced was that the demurrer was pending.

[JESSEL, M.R.: The rule as to rehearing means a rehearing of the whole cause.]

Yes. There is only one proceeding before the judge, and in an ordinary case, where there was no demurrer, the decree would be pronounced at once when the question of fact had been decided. No further argument would take place.

[JAMES, L.J.: There was only one hearing in *Fernie v. Young* (').]

But the decision of the House of Lords depended entirely on the enactments of the Chancery Amendment Act, and there is no analogous legislation with regard to the Probate Court.

[MELLISH, L.J.: Would there, before the Judicature Act, have been an appeal to the House of Lords from a decision of the judge of the Probate Court on a question of fact?]

Yes, there would. If this objection is to prevail we

(') Law Rep., 1 H. L., 63.

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shall be deprived of the power of appealing by a mere technicality.

Thesiger, Q.C., and *Bayford*, for brothers and sisters of Lord St. Leonards.

Davey, Q.C. (with whom was *G. Browne*, and *Keogh*), for Mr. and Mrs. Henderson: The fallacy in the argument [212] of the *plaintiffs is this: there was no direction for the trial of any issues of fact; it was the hearing of the cause. The form of the order of the 22d of June shows this. The Probate Rules distinguish between the hearing of the cause by the judge without a jury, and the trial of issues by a jury. In the latter case, Rule 52 provides that the issues between the parties are to be prepared by the party declaring and settled by one of the registrars. There were not two proceedings in this case; a trial of issues, and afterwards the hearing of the cause, as in *Fernie v. Young* ('). There was only one proceeding, the hearing of the cause. *Fernie v. Young* (') is really an authority in our favor. If in that case, instead of issues having been directed to be tried, the court had heard the cause upon affidavit, or upon *viva voce* evidence, the Court of Appeal and the House of Lords would have felt no difficulty in reviewing the decision of the judge on the evidence as well as on the law.

[JAMES, L.J.: What is the meaning of the words "evidence given *viva voce*," in Rule 60?]

The court, after hearing the *viva voce* evidence, might wish to read over the shorthand writer's notes of it, and to have an opportunity of considering the effect to be given to it.

[MELLISH, L.J.: Fresh evidence might have been discovered, or one of the parties might have been taken by surprise by some particular evidence adduced by the other party. These would be grounds for a rehearing, not for an appeal.]

COCKBURN, C.J.: You say that you may apply to the judge upon the chance of his reversing his former decision, but it is not obligatory on you to do so. You may, if you please, appeal at once to the higher court.]

That is what is suggested.

COCKBURN, C.J.: I think we have all now come to this conclusion, that it is optional with the parties, if they think it would be advantageous that the judge should reconsider the evidence with a view to the decision of the facts, to apply to him for that purpose; but it is not obligatory on them to do so. They may, if they please, treat his decision

(') Law Rep., 1 H. L., 63.

on the facts as a final decree in the cause and appeal from it at once.

*JESSEL, M.R., JAMES and MELLISH, L.JJ., and [213 BAGGALLAY, J.A., concurred.

The evidence was then read, and the argument proceeded on the merits.

Sir *H. Giffard*, S.G. (Dr. *Deane*, Q.C., and *Bayford*, with him), for Lord St. Leonards: Probate cannot be granted of that which is admitted to be imperfect, which is admitted not to be the whole of the will. It is admitted that the will contained some legacies (the amount does not signify) which are not disclosed in the document which is propounded for probate. It is admitted that there were ultimate remainders limited of the real estates which Miss Sugden cannot remember. There is a difference with respect to legacies of personal estate and limitations of real estate. Before the Probate Court Act of 1857, a person to whom, for instance, a life estate in land was devised could have recovered in ejectment against the heir, the question of the subsequent limitations being left undetermined. But under the Probate Court Act, the heir is cited and is bound by the probate in respect of the whole instrument. As to the legacies, to the extent to which they are omitted and the residue thereby increased, the intentions of the testator are defeated by admitting the document to proof.

[JAMES, L.J.: If a legacy fails from any cause, that enures to the benefit of the residuary legatee. The next of kin have no interest in the question.]

The question is, whether this document is that which the testator intended to operate.

[COCKBURN, C.J.: Suppose a will to have been partly destroyed by fire or otherwise, is no effect to be given to that part which is left?]

If a material portion had been destroyed, the effect of which could not be ascertained by other evidence, the part which remained could not be admitted to probate. There is no case in which a portion of a will has been admitted; in every case of the kind the substance of the whole will has been proved.

[JESSEL, M.R.: Is there any case in which a portion of a will has been offered for probate, and probate has been refused?]

*In *Montefiore v. Montefiore* (¹), probate was refused of an instrument which had been written to a certain extent by the testator, but not finished.

(¹) 2 Ad., 354.

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[JESSEL, M.R.: You could not tell what he intended to write before he had finished writing.]

JAMES, L.J. The *ratio decidendi* was that the court was not satisfied that there was evidence that the testator had come to a final resolution.]

The principle was that the court must be satisfied what the intentions of the testator were. If a part of a will be struck out, to that extent you are doing that which the testator did not intend to do. In this case it is said that the omitted legacies were of trifling amount, but the same principle would apply if they had amounted to two-thirds of the estate. The duty of the court is simply to give effect to the testator's will. Then, in the second place, there is not sufficient evidence to rebut the legal presumption that when a testator's will has been traced to his custody, and it is not to be found at his death, he has destroyed it *animo revocandi*. In the absence of evidence, the court will not presume that the will has been abstracted fraudulently or criminally.

[COCKBURN, C.J.: You must take into account the improbability of a man like Lord St. Leonards destroying his will, and doing so with the intention of dying intestate. I agree with you that we are not to presume crime, but, on the other hand, we are not to presume imbecility. In substance, we have Lord St. Leonards, down to the very last moment of his life, saying, "I have made all the testamentary dispositions which a careful man ought to make, which a father ought to make for his family, and I die in peace with that conviction." Are we to discard all that, and, simply upon the ground that crime is not to be presumed, to say that the will must have been destroyed by him?]

The onus of proof lies on those who set up the will.

[JESSEL, M.R.: By the 20th section of the Wills Act the onus is thrown on those who seek to show that the testator has destroyed his will with the intention of revoking it. The whole of the evidence must be taken together to 215] see whether it raises a *presumption that the will was destroyed by the testator with the intention of revoking it.]

In *Brown v. Brown* (') Lord Campbell said that, in the absence of rebutting facts, it was a *presumptio juris* that the testator had cancelled the will himself.

[COCKBURN, C.J.: We are all of one mind that it is impossible to come to the conclusion that Lord St. Leonards destroyed his will intending to revoke it.]

(') 8 E. & B., 876, 884, 886; 27 L. J. (Q.B.), 173.

It might have been destroyed with the intention of making another, and death might have surprised him before he had carried out his intention.

Thesiger, Q.C., and *Bayford*, for brothers and sisters of Lord St. Leonards.

Davey, Q.C. (*G. Browne* and *Keogh* with him), for Mr. and Mrs. Henderson: The will ought not to be established upon the sole testimony of one of the residuary legatees. There is no other legal evidence of the contents. No declarations made by the testator after the date of his will are admissible as evidence of its contents.

[JESSEL, M.R.: If they are admissible to show that the will had not been revoked, are they not, when once admitted, evidence for all purposes?]

They are not evidence. And, further, all declarations made by the testator from the 13th of January, 1870, the day on which he executed the will, to the 20th of August, 1873, the last day on which, unquestionably, it was in existence and unrevoked, are inadmissible as evidence for any purpose whatever. In order to admit them as evidence of adherence to the will, it must first be shown that the will was lost at the time when they were made. In *Doe v. Palmer* (*) there is a dictum of Lord Campbell in support of this proposition, and *Quick v. Quick* (*) is a direct authority on the point. *Staines v. Stewart* (*) is another case in point. In *Hill v. Wilson* (*) this court refused to admit a claim against the estate of a dead man on the unsupported *oath of one interested witness whose character was [216 irreproachable.

[JAMES, L.J.: On the other hand, there is danger of a will being destroyed when there is only one person who can prove its contents.

JESSEL, M.R.: If a will was purposely destroyed by an heir-at-law, it would be a very shocking result if the evidence of one person who alone had read it could not be admitted to prove the contents.]

At any rate, the decree ought to be varied by giving us costs out of the estate. The decree gives only one set of costs to the defendants.

Hawkins, Q.C., and *Inderwick*, Q.C. (*Dr. Tristram* with them), for the plaintiffs, were directed by the court to confine their argument in the first instance to the question whether the testator's declarations were admissible as secondary evidence of the contents of the will.

(*) 16 Q. B., 747; 20 L. J. (Q.B.), 367.

(*) 2 Sw. & Tr., 320.

(*) 8 Sw. & Tr., 442; 33 L. J. (P. M. & A.), 146.

(*) Law Rep., 8 Ch., 888.

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No objection was raised to the admissibility of the evidence in the court below, and being admitted for one purpose, viz., to show that the will had not been revoked, it can be used as evidence on all the questions at issue. Evidence once legitimately introduced for one purpose may be used for the purpose of corroborating the evidence on some other fact, though it would not *per se* have been enough to establish that fact. For instance, under the old law, though a document could not be put in evidence merely for the purpose of proving handwriting, yet, if it could be introduced for any legitimate purpose, the jury had a right to look at it, and then they could form a judgment from a comparison of the handwriting. Then *Doe v. Palmer* (*) is an authority for admitting the declarations before the date of the will, and *Quick v. Quick* (†) is not binding on the Court of Appeal. And, in principle, what difference is there between the case where a man who is just about to execute his will writes to a friend, "My attorney is here, and I am just going to execute my will, in which I have made such a provision for A. B.," and the case where, the moment after a man has executed his will, he writes to a friend to the same effect? If there is a difference, it is in favor of admitting the declaration, "I have done this," rather than that which only amounts to saying, "I intend to do it." If a testator said, years after the execution of his will, "I have provided for this or that relation," that of course would not be such strong evidence as a declaration made immediately after the execution, but a declaration made immediately, or soon afterwards, must carry much greater weight than one made several months before.

[The following cases were also referred to: *Johnson v. Lyford* (*); *Keen v. Keen* (†); *In the Goods of Sykes* (†).]

Davey, Q.C., in reply.

Cur. adv. vult.

Mar. 13. COCKBURN, C.J.: This is an appeal against a decree of the President of the Probate Division, granting probate of a paper purporting to be the substance of the will of the late Lord St. Leonards. The will was last seen on the 20th of August, 1873; the death of the testator took place on the 29th of January, 1875. The will was kept in a small box placed on the floor of a room called the saloon, on the ground floor of the testator's house. Upon his death

(*) 16 Q. B., 747; 20 L. J. (Q.B.), 867.
(†) 3 Sw. & Tr., 442; 33 L. J. (P. M. & A.), 146.

(*) Law Rep., 1 P. & M., 546.
(†) Law Rep., 3 P. & M., 105.
(*) Law Rep., 3 P. & M., 26.

it was looked for in that box by the solicitor employed by the executors, and it could not be found. Several questions arise upon this state of facts. In the first place, was the will destroyed by the testator *animo revocandi* or not; secondly, can secondary evidence be given of its contents; thirdly, if so, have we satisfactory evidence of the contents; and lastly, if the evidence is satisfactory, so far as it goes, but not altogether complete, ought probate to be granted, so far as the evidence which we have before us shows what were the contents?

Now, where a will is shown to have been in the custody of a testator, and is not found at his death, the well-known presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but of course that presumption may be rebutted by the facts. Although *presumptio juris*, it is not *presumptio de jure*, and of course the presumption will be more or *less strong [218 according to the character of the custody which the testator had over the will.

Now here we have to observe that the custody was anything but a close custody. The box was kept in a room on the ground floor, common not only to the inmates of the house, but to any one who had obtained access to it. It was kept in a common box, easily opened, and the key was kept in an *escritoire* not always under lock and key. It is in evidence, that of the different keys in the house there were no less than five by which the *escritoire* might be opened, and the will was, no doubt, known to the inmates of the house, or to those who had been its inmates, as being kept in this box, for, as a matter of fact, Lord St. Leonards was constantly, or, at all events, frequently, engaged in making wills or codicils, testamentary dispositions of one sort or another, and upon all these occasions some of the servants of the house were called in to witness the execution of the testamentary document, and, therefore, would well know that the box was the place for the deposit of the testamentary papers of Lord St. Leonards.

Next comes the question whether it is or is not probable that the will should have been destroyed by the testator, and here we must look at the position and character of the man. It would be difficult to find a more methodical man of business than the late Lord St. Leonards; it would be difficult to find any one who had a deeper sense of the importance of testamentary dispositions. We find that between 1867 and 1873 he made no less than two wills and eight codicils. He always exhibited the greatest possible

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anxiety to make a proper provision for the members of his family, and more especially for his daughter, Miss Sugden, for whom it is quite clear that he entertained the warmest and fondest affection, and who would be left wholly unprovided for in the absence of testamentary provision made in her favor. He upon all occasions expressed a deep sense of the duty, which every man ought to act upon, of making testamentary provision for those who were dependent upon him. We know, also, although, of course, we might have presumed it independently of any specific knowledge of the fact, that he was quite alive to the danger of destroying one will with the view of making another, and of the necessity 219] of making a *will, as it were, *uno flatu*, to prevent the possibility of any question arising as to his intention. It must be remembered that it is in evidence that upon two occasions when he was making his will, in 1867 and 1870, there was the greatest difficulty in prevailing upon him to take refreshment, because he would not be interrupted in the work, and he gave as a reason that, if anything should happen to him while the will was, as it were, in suspense, questions might afterwards arise upon it.

Now, besides that, we have the fact that, from the time of making his will in 1870 down to the time of his death, he was in the constant habit of talking to every one with whom he came into contact, most certainly to all the inmates of the house with whom he was brought into daily contact, of the testamentary provisions he had made, expressing his satisfaction at what he had been able to do for the different members of his family, more especially for Miss Sugden, and at his having acquired, by his own professional powers and exertions, so large an amount of property. The possession of that property, the disposition of that property, and the satisfaction he felt in having made provision for the peerage which he had founded, and for the various members of his family who were dependent upon his bounty, seem to have been constant subjects of his thoughts, upon which his mind delighted to dwell, and also constant topics of his daily discourse with almost all the persons with whom he was brought into contact. It seems to me utterly impossible to suppose that, under these circumstances, such a man as Lord St. Leonards would voluntarily have destroyed this will, whether for the purpose of revoking it, or making another, or for any other purpose that could be conceived. My mind revolts from arriving at any such conclusion, and I feel bound to reject it.

Now the last time the will was seen was by Miss Sugden,

on the 20th of August, 1873. Lord St. Leonards was taken ill in September, 1873, and was confined to his room from that time to Christmas, 1873, and during the whole of that time the box was kept by Miss Sugden, as she tells us, in her own room; when he again rejoined the family down stairs, she replaced the box in the saloon, that he might not miss it, and it remained there until his last illness commenced, in March, 1874. It was then again taken possession *of by Miss Sugden, and kept by her until [220 Lord St. Leonards' death; therefore it could only have been got at by him between Christmas, 1873, and March, 1874. Long after March, when he was stricken with his last illness, and from which time he was confined to his own bed-room, he again and again referred to the various provisions he had made by the will, in other words referred to the will itself as still subsisting, and this again adds to the vast improbability of his having destroyed the will. The only conclusion I can arrive at is, not that he destroyed it, but that it was clandestinely got at by somebody and surreptitiously taken away; who that somebody is, is one of those mysteries which time may possibly solve, but which at present it would defy human ingenuity to say.

When the idea of Lord St. Leonards having himself destroyed the will is disposed of, the next question which presents itself is, whether, the will having been lost, secondary evidence can be given of its contents. Now, that matter is disposed of by the authority of *Brown v. Brown* (1), which, I think, has been recognized as perfectly sound. There Lord Campbell says, "Parol evidence of the contents of the lost instrument may be received as much when it is a will as if it were any other document," and in that I, for one, most entirely concur. The consequence of a contrary ruling would be in the highest degree mischievous, it would enable any person who desired, from some sinister motive, to frustrate the testamentary disposition of a dead man, by merely getting possession of the will to prevent the possibility of the will of the deceased being carried into execution. No doubt the absence of the will is a serious fact, and one which may place the court, which has to decide whether the parol evidence of the contents is right or wrong, in a position of considerable difficulty; but with that difficulty it is the business of the court to grapple, in order that effect may be given to the will made according to the requirements of the statute, and which after the testator's death ought to be carried into effect.

(1) 8 E. & B., 876; 27 L. J. (Q.B.), 178.

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I go, then, to the third question, which is whether we have before us sufficient evidence of the contents of the will. This, undoubtedly, depends upon the evidence Miss Sugden alone, to this extent, that, if we had not that evidence, all the other parol evidence in the case, and even the documentary evidence, would not enable us to say that we had ascertained the contents of the will so as to give effect to it.

[His Lordship stated the effect of the will as given by Miss Sugden, and proceeded:]

Now this is the account which Miss Sugden gives us of this will of 1870, which she says was compounded of a will made in 1867, and additions to it in 1870. She tells us that in 1870, the testator, having in the meanwhile bought the property at Kingsdown for £41,000, and being desirous of settling that on his son Frank, made an addition to his former will, first taking off, as she says, the attestation clause, and, I presume, also the signature. It is admitted on both sides that the veracity and honesty of purpose of Miss Sugden are beyond all question, and that, whether she is strictly accurate or not in the details she has given us, she has spoken only with a desire to tell the simple truth. She may have made mistakes, and I think she must have made some mistakes, and the impression on my mind is that she has certainly fallen into some confusion between the contents of the will of 1867 and the will of 1870, or the addition made to it in 1870, for it seems to me impossible to suppose that Lord St. Leonards would have omitted in the will of 1867, which, as is represented by Miss Sugden, comes down to the appointment of executors, a disposition of his residuary estate. I think it is impossible, also, that the legacies to the different members of his family should not have been thought of and provided for by him in his first will of 1867. There is a long series of legacies given to various members of his family, none of which are mentioned in his first will of 1867. I cannot think that he would have omitted any mention whatever of so many daughters and their children, all of whom are mentioned, and have legacies left to them, in the will of 1870. But I am bound to say that I attach very little importance to any confusion upon this head into which Miss Sugden may have fallen. No matter whether the dispositions to which I have last adverted, including what is the most material, namely, the residuary clauses, were in the first will, or were in the addition, so as to constitute the second; if we have obtained the substance of the will of 1870, although the

particular dispositions may not occur in the precise order stated by Miss Sugden, if we have got the substance, in my opinion that is abundantly sufficient.

Now we have to ask ourselves how far, Miss Sugden's veracity and honesty of purpose not being for a single moment questioned, we can place implicit reliance upon that lady's recollection of the various testamentary dispositions contained in the will upon which she has spoken. No doubt the observation naturally presents itself that in a matter of this kind, with details more or less of a technical character, it is not likely that these things should have impressed themselves upon a lady's mind, or that she should be able to produce them with anything like satisfactory accuracy. But then I think, as the learned President of the Probate Division has pointed out in his luminous judgment, we must look at the peculiar position of Miss Sugden, and the peculiar training which she had undergone. She lived with, and devoted her life to a great lawyer, who may be said, literally, to have lived in the law, who seems to have devoted his whole life, even to the last, to the study of the law and to the production of those works which are so highly valued by the profession. Then he was in the habit of employing Miss Sugden as his amanuensis, and when he was preparing the various editions of his works, he employed her to correct the proofs; he was fond of explaining to her the various points of law, as they from time to time presented themselves, in going through his works, and explaining to her things which otherwise, no doubt, she would not have been able to understand. Now, besides that, she had on various occasions, an opportunity of reading these two wills of 1867 and 1870; upon each occasion when Lord St. Leonards had completed his will he read it over to her, and she had other opportunities of seeing the will, and she tells us that she read it over three times; besides being called upon by him, on different occasions, when he was making a codicil, to refer to the will for the particulars which he wanted. That, of course, places her in a very different position from what would have been the case with a lady otherwise circumstanced; her story, therefore, I am prepared to believe, that, with all these advantages, she had become familiar with the testamentary dispositions made *in these wills by her father. It [223 is true, when we look at the will as propounded, at the paper purporting to contain the provisions of the will as propounded, the language may be found to assume a technical character, of which it would be little likely that, even

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with all her opportunities and advantages, Miss Sugden should have acquired the command. But then, the answer to that is given, I think, by Sir James Hannen, namely, that her statement is not clothed in that technical and professional form, but is the simple statement of a layman, of what the provisions in the will were.

It is, nevertheless, open to observation, that Miss Sugden is a very interested person, that she takes very large benefits under this will. I am glad to think that it has not occurred to any one to say, or to suggest, that upon that ground Miss Sugden has intentionally departed one hair's breadth from the truth. Nevertheless, a deep interest in the details of a will may lead a person, under the bias which interest so naturally produces, to fancy she recollects something in her own favor which she may not really recollect; therefore, although I am perfectly ready to give implicit credence to everything which Miss Sugden has stated as to the contents of this will, I should be glad to find, for my own satisfaction, and the satisfaction of every one else, corroboration of her statements in the collateral evidence. Those statements, it will be observed, have reference partly to the real property left by Lord St. Leonards and partly to the personalty. Now let us see what confirmation there is of her representation as to the dispositions of the will relating to the real property; and that confirmation is to be found, practically, if not entirely, in the codicils made by Lord St. Leonards, between the execution of the will in 1870 and August, 1873, when the last codicil was made. These codicils refer, again and again, to the dispositions of the real estate made by the will; and it has been pointed out in the elaborate and most able judgment of Sir James Hannen how the various statements of Miss Sugden as to the particular provisions of the devises of the real estate are confirmed by references to them in the codicils. It would require some time to go over the whole of the ground, and to point out how codicil after codicil confirms and supports her statement with regard to the disposition of estate after estate. This, however, has been done so fully and, to 224] my mind, so conclusively, *in the elaborate judgment of Sir James Hannen, that it is only necessary to refer to that judgment for the conclusion I have arrived at, namely, that the codicils afford abundant confirmation of her statements with regard to the real estate.

I come then to the personalty, as to which the codicils do not help us, and where, therefore, if Miss Sugden's statement required confirmation, it would be necessary to look

for it elsewhere. And here I may say, once for all, that, in my opinion, if there were not one tittle of confirmatory evidence as regards this or the other part of the will, I am so satisfied of the perfect truthfulness, substantially speaking, of the statement of Miss Sugden (I think she may have fallen into confusion upon some matters, and there may have been some omissions from her statement) that I only enter into this part of the evidence because it is satisfactory to find statements which involve such vast interests to the parties concerned corroborated by extrinsic independent proof. Now, this corroboration is to be found more immediately in the testamentary papers and statements, and verbal declarations of Lord St. Leonards himself. And here the question arises as to the admissibility of these declarations; and although, as I just said, I look upon this part of the evidence as the least important, because I am perfectly satisfied without it as to the conclusion at which I arrive, still the question of the admissibility of the evidence is one of considerable importance in a legal point of view, and, as I am clear upon it in my own mind, I think it had better be disposed of. The question is whether the declarations of the testator can be received as secondary evidence of the contents of the lost will. No doubt, generally speaking, where secondary evidence is admissible, if oral, it must be given on oath; if documentary, it must be verified on oath. Nevertheless, the declarations of deceased persons are in several instances admitted as exceptions to the general rule; where such persons have had peculiar means of knowledge and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands pre-eminently in that position. He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them, except in the rare *instances [225 in which a testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree, evidence not always to be relied on, yet sufficiently so to make it worth admitting, leaving its effect to be judged of by those who have to decide the case.

It is upon this principle, I presume, that the declarations of a deceased testator have in more than one instance been admitted as evidence. Thus, they have been admitted, as

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in *Doe v. Palmer* (¹), to negative the presumption arising from interlineations appearing on the face of a will, that such interlineations have been made subsequently to the execution of the will. In like manner the declarations of a testator have been admitted to show the continuing existence of the will at the time they were made, and so to rebut the presumption of the will having been destroyed *animo revocandi* when the will, having remained in the custody of the testator, is no longer forthcoming. Thus, if a testator were to say, "When I am dead you will find my will in such a place;" or, "I have left my estate of Blackacre to my son John;" or, "I have left £5,000 to my daughter Mary;" such, or similar declarations, would be receivable in evidence to show that the will was, so far as was known to the testator, in existence at the time they were made.

The question before us is whether the statements made by a testator as to the provisions of his will can be received as evidence of the contents of a will known to have existed, but which at his death is no longer forthcoming. That, morally, such statements and declarations are entitled, where no doubt exists of their sincerity, to the greatest weight, cannot be denied; and I am at a loss to see why, when such evidence is held to be admissible for the two purposes just referred to, it should not be equally receivable as proving the contents of the will. If the exception to the general rule of law which excludes hearsay evidence is admitted, on account of the exceptional position of a testator, for one purpose, why should it not be for another, where there is an equal degree of knowledge, and an equal [226] absence of motive to speak *untruly? Could it be contended that, if the testator had given written instructions for his will, or had first made a draft of the will, and had indorsed on the back of it, "This is the draft from which I copied my will," the draft would not have been admissible to prove the contents of the will? Or suppose he had made a copy of the will, indorsing it as such, is our law this that the copy would be inadmissible to show the contents of the will if it was lost?

All the observations made by Lord Campbell in *Doe v. Palmer* (¹) as to the mischief which would result from excluding such testimony apply equally here. "If the draft of the will could be produced," says Lord Campbell, "corresponding with the will in its altered form, would it not be admissible evidence, and might not the jury infer from

(¹) 16 Q. B. 747; 20 L. J. (Q.B.), 367.

it that, before the will was executed, the draft and the will had been compared and the mistake rectified? Would not written or verbal instructions from the testator to his solicitor to draw the will in the altered form be equally admissible? In what respect do such verbal instructions differ, for this purpose, from a contemporaneous declaration by the testator to another person that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? What distinction can be drawn between the draft of the will, or the written instructions for the will, and the verbal declaration of the testator's intention, except as to the strength of the evidence which they respectively afford? As to admissibility, they all seem to rest on the same principle; and, if the verbal declaration of intention must be rejected, so must the draft of the will with the initials of the testator affixed to it. It would not be very creditable to the law if such evidence were to be excluded; and I am not aware," he adds, "of any principle, rule of law, decided case, or dictum against the admissibility of such evidence." These observations, in which I entirely concur, appear to me equally applicable to the present case. I entertain no doubt that prior instructions, or a draft authenticated by the testator, or verbal declarations of what he was about to do, though, of course, not conclusive evidence, are yet legally admissible as secondary evidence of the contents of a lost will. There are no doubt cases in which *the declarations of a testator are inadmissible. Thus [227 a statement by a testator that he had duly executed his will could not be received as evidence of its due execution, as was decided in *The Goods of Ripley* (1); and there is good reason for the decision, namely, that the exercise of the testamentary power, being conditional on the observance of the formalities prescribed by statute, a man cannot, by his own mere assertion, establish that he has fulfilled the conditions necessary to the exercise of the right. So, where there is a patent ambiguity on the face of a will, arising from an error either in the designation of the person who is to take, or of the property bequeathed, which makes the carrying of the will into effect impossible, the instructions or other declarations of the testator cannot be resorted to to remove the difficulty. For here again the statute comes in the way, and prevents effect being given to the will otherwise than as executed by the testator. So that if, as in *Doe v. Hiscocks* (2), he has spoken of John as the eldest son of his son John, when in fact the eldest son of John

(1) 1 Sw. & Tr., 68.

(2) 5 M. & W., 363.

was Simon, and John was the second son, effect cannot be given to the will by showing that the testator meant Simon when he said John. That would be to make a new will unaccompanied by the statutory requirements. It is obvious that the present case stands on totally different grounds. Like that of *Doe v. Palmer* (¹), it has no reference to an ambiguity to be solved. No difficulty here arises as to making the will speak differently from its language as executed by the testator. There being no question as to the due execution, the statute creates no difficulty. The question is simply one of the admissibility of secondary evidence, and has to be determined by the rules of evidence alone. I am therefore decidedly of opinion that all statements or declarations, written or oral, made by a testator prior to the execution of his will, are admissible as evidence of its contents; and this of course lets in, in this case, the papers "J" and "K," memoranda made by the testator as preparation for his will.

The admissibility of declarations made subsequently to the execution of the will creates difficulty by reason of a dictum of Lord Campbell in *Doe v. Palmer* (¹), and a decision of Lord *Penzance in *Quick v. Quick* (²). In principle there appears to me to be no distinction. The position of the testator is the same, as respects both peculiar knowledge and motive for speaking the truth, which can be no less than the motive which he has when making statements as to his intentions prior to the execution of the will. In the case of a holograph will, the testator alone may know the contents. In the case of its loss, his statements afford, morally, the best evidence of the contents; yet we are asked to exclude their operation as showing the contents, though it is acknowledged that such evidence is available to rebut the presumption of revocation, and to establish what is called adherence to the will. The adoption of such a rule would, moreover, lead to a very strange anomaly. The great majority of statements made by a testator, adduced for the purpose of proving adherence, are in fact statements as to the contents of the will. But such statements of the contents of the will, assumed to be truthful, having been admitted and acted upon for the purpose of showing that, so far as the testator was concerned, the will was still alive, how is it possible to shut out that evidence when the contents come directly in question? It appears to me that if, as an exception to the general rule, the evi-

(¹) 16 Q. B. 747; 20 L. J. (Q.B.), 367. (²) 3 Sw. & Tr., 442; 33 L. J. (P. M. & A.), 146.

dence is admissible for the one purpose, it must be equally so for the other. How can we use evidence of the contents of a will for an ulterior purpose, and shut out the same evidence when the contents of the will are themselves immediately in question?

As regards the two authorities referred to, it is to be observed that what was said by Lord Campbell in *Doe v. Palmer* (*) is merely an *obiter dictum*, unnecessary to the decision of the case, inasmuch as all the declarations of the testator given in evidence there had been made prior to the execution of the will. Lord Campbell says, "Declarations of the testator after the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires," a proposition in which, for the reasons I have already given, I fully concur. He then goes on to say, "And, for the same reason, a declaration by the testator after the will was executed, that the alteration had been made previously, would be inadmissible." This may be more doubtful. But assuming it to *be right, [229 it does not touch the present case. The question in *Doe v. Palmer* (*) turned on the efficacy or inefficacy of the execution, which, if made after the interlineations, would be valid, but if made before they were inserted, would be inoperative to cover them. What it comes to is, that the declarations of a testator cannot be used to prove that the execution of the will was such as to give effect to it. The dictum of Lord Campbell does not really, any more than the decision in the case, affect the question of the admissibility of the declarations of a testator as to the contents of his will where the execution is not in question.

The case of *Quick v. Quick* (†) is, however, an authority directly in point, as the contents of the will were there sought to be proved by declarations of the testator made after its execution. Refusing to act on these declarations, Lord Penzance refused probate of the will. Taking a different view of the law, for the reasons I have given, I cannot concur in the judgment of Lord Penzance in the case of *Quick v. Quick* (†), and I feel that we are bound to overrule it.

I am, therefore, of opinion that the various statements of Lord St. Leonards, whether before or after the execution of his will, are admissible to prove its contents. This being so, the statements of Miss Sugden receive abundant confirmation. The paper in the handwriting of Lord St. Leon-

(*) 16 Q. B. 747; 20 L. J. (Q.B.), 367. (†) 3 Sw. & Tr., 442; 33 L. J. (P. M. & A.), 146.

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ards, marked "J," sets forth the legacies he was about to make, substantially as Miss Sugden has represented them as occurring in the will, with one or two trifling errors easily corrected. The emphatic statement made by the testator to Mr. Frank Sugden that he intended to do more for those of his daughters who had given him the least trouble and shown him the most affection, and his reiterated statements to every one about him as to what he had done for Miss Sugden, and that she would not only be a landed proprietor but would be wealthy, and would enjoy the same comforts and style of living which she had enjoyed when living with him, a result which certainly would not have followed from the provisions made for her in the first will, suffice to confirm her statement that the residue of the personal estate was left to her and two of her sisters to the exclusion of the other daughters.

230] *I am, therefore, of opinion that if the statement of Miss Sugden needed confirmation—which I think it does not—the codicils, the testamentary papers, and the parol evidence of the declarations of Lord St. Leonards abundantly confirm it.

As regards the only remaining question, namely, whether, assuming that we have not before us all the contents of the lost will, probate should be allowed of that which we have, so long as we are satisfied that we have the substantial parts of the will made out, I cannot bring myself to entertain a doubt. If part of a will were accidentally burnt, or if a portion of it were torn out designedly by a wrongdoer, it would nevertheless, in my opinion, be the duty of a Court of Probate to give effect to the will of the testator as far as it could be ascertained. It is not because some, who would otherwise have benefited by the will, may thus fail to profit by the intended dispositions of the testator, that his will should be frustrated and fail of effect where his intentions remain clearly manifest. It may be that in this will there were matters which Miss Sugden fails to remember—and I cannot but think that there must have been ultimate remainders which Miss Sugden no longer remembers—indeed, she has herself said that there were other remainders that she does not recollect. So far, therefore, we have the contents of the will before us in a defective form. It may also be that there are some few legacies—there cannot be many—which she does not recollect. They must be few, and they cannot have been of any material consequence. But we have the substantial testamentary dispositions brought to our minds, and it would not be right to enable any wrong-

doer or any accident—not putting it so high as an intentional wrong—which might happen to a will, and which would prevent the court which had to deal with it from being perfect master of its contents, to prevent the will from being carried into effect so far as the dispositions of the testator had become known. I think there could not be a more mischievous consequence; and although it may be unfortunate that the will cannot be carried into execution to the full extent of the testamentary dispositions of the testator, I think that of two evils or two inconveniences it is far better, where the court can see its way to the essentially substantial dispositions made in a will, that it should give effect to them, although possibly *some of the intentions of [231] the testator may not be carried into effect.

For these reasons I am of opinion that the decree of the President of the Probate Division, granting probate of the paper propounded as containing the provisions of the will of the late Lord St. Leonards, was right and should be affirmed.

I am further of opinion that, after the elaborate and luminous judgment of Sir James Hannen, the parties ought to have been satisfied, and this appeal should not have been brought, and that consequently it should be dismissed with costs.

JESSEL, M.R.: If this were an ordinary case I should content myself with saying that I concur in the judgment which my Lord has just pronounced. But it is not an ordinary case; it involves legal considerations of great importance, although of great rarity, and I therefore think it right to pronounce a judgment of my own.

The points brought before us I will deal with in the following order: I will first consider the question of the revocation of the will. Now, as to that, no doubt, the law requires that it should be proved satisfactorily that a will has been duly executed and attested. You must also prove destruction of the will with intent to revoke, in order to get rid of the will itself. But there is another rule of law equally well established—that you do produce satisfactory proof of that which the Legislature requires, if you trace the will to the possession of the testator, and it is not forthcoming at his decease, and there is no evidence to show what has become of it. That raises a sufficient presumption of law that he destroyed it with the intention of revocation; but like all other presumptions of law, it may be rebutted by sufficient evidence. I believe I am right in saying that,

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like all other presumptions of law, it may be rebutted by what is commonly called parol, but in this case might, more strictly perhaps, be called oral evidence. To determine the first question, therefore, we have only to consider whether there is sufficient evidence to rebut the presumption.

Now, after the elaborate judgment delivered by the learned President in the court below, and by the Lord Chief Justice 232] in *this court, I shall not recapitulate the details of the evidence; but I must say I am satisfied that the testator in this case died under the belief that he had left behind him a will disposing, in a manner satisfactory to him, of his whole estate. Every act of his life which is proved, every statement made by him which is proved, in respect of his testamentary dispositions, to my mind point to but one conclusion, and to arrive at a contrary conclusion would be to believe that Lord St. Leonards not only spoke a lie but acted a lie to the last moment of his existence. I think in this case the presumption of revocation is completely rebutted, not only by the evidence of Miss Sugden herself, but by all the other evidence which is directed to that portion of the contest.

The next point which we have to consider is one of a very serious character. It is said, and truly said, that, however great may be the reliance to be placed upon the testimony adduced as to the contents of this will, there is no evidence of the whole of the contents of it; and, further, there is evidence that a portion of the contents is not now known. Upon that there can be no doubt or question, because the principal witness—in fact for certain purposes the only witness in support of the instrument—Miss Sugden, herself tells us, first, as regards the personalty, that there were some small legacies the particulars of which she is unable to recollect; and, secondly, as regards a considerable portion, in fact the larger portion, of the real estate, that there were some limitations over after the seven life estates, besides the estates limited to the issue of the tenants for life, the particulars of which she does not remember, although she does remember that other estates were left amongst the members of the family. Therefore, we have, in the one case, legacies, no doubt, of comparatively small amount, trifling in themselves, the particulars of which we are unable to discover; in the other case we have limitations, remote, indeed, and unlikely to come into effect, but still which are undoubtedly omitted from the document of which probate has been granted, and the question which we have to decide is, whether under

such circumstances as these we can admit the will to probate at all?

Now I will consider the argument, first, as affecting the personal estate; and, secondly, as affecting the real estate. The argument *as to the personal estate was this: [233] It was said, if it is proved to your satisfaction that legacies are omitted, then, by granting probate of the will which disposes of the residue, you are giving a larger proportion of the personal estate to the residuary legatees than was intended for them by the testator, and in so granting probate you are not only not performing the intention, but you are acting contrary to the intention, of the testator. This argument appears to me to be fallacious—it turns on the use made of the word “intention.” It seems to me that the testator may be said to have in this respect two intentions—he has a primary intention that the legatee, whether general or specific, shall take the legacy—he has a secondary intention that, if by any reason whatever that legacy cannot take effect, then it is to go, not to his next of kin, but to his residuary legatees. It may well be that we are not able to give effect to the primary intention, but we certainly are able to give effect to the secondary intention; and I see no reason why we should not give effect to the secondary intention because the circumstances which have happened have made it impossible to carry out the primary one to the extent of the legacies, the amount of which, and the names of the legatees of which, we do not know. This is by no means a new version of the law. We are familiar with the law as to personal estate as it existed before the last Wills Act, which has been extended by that act to devisees of real estate—I mean the rule that lapsed or void bequests fall into the residue. Now, the rule which was established by the judges before the Legislature confirmed it by the Wills Act meant this—not that the testator whose whole property was, say £11,000, and who gave £10,000 to his son, and the residue to his nephew, not contemplating that the son would die in his lifetime, intended the £11,000 for the nephew, because everybody knows that a testator, in the absence of express provision to the contrary, contemplates the survival of his legatee; but it meant this: that he intended that particular nephew to take what was left of the personal estate under whatever circumstances the residue might be increased. In the case of lapsed bequests the intention was entirely defeated; in the case of void bequests—say that the testator being possessed of £11,000 consisting wholly of

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mixed personalty, gives £10,000 to a charity and the residue due *to A. B., a stranger—it might well have been said he would not have preferred that stranger to his next of kin, had it not been that he died in the belief that the bulk of his fortune would be devoted to charity, and to say that that which the charity cannot take shall go to augment the residue in favor of the residuary legatee, a stranger, is entirely contrary to the intention which might naturally be imputed to the testator. But the law is clear upon the subject, that, the primary intention not being capable of being carried out, because the charity cannot take, the residuary legatee takes the fund, although it was certainly not the primary intention of the testator. The same principle was extended to the case where it was uncertain who the legatee was. The uncertainty might arise in various ways—the handwriting of the testator (and this has happened in holograph wills) might be so bad that it was impossible to read the name of the legatee, and there was no other description by which to identify it—in that case the intention of the testator was certainly to benefit the legatee to the extent to which he was mentioned, yet, in the uncertainty as to his name, the sum given to him fell into and augmented the residue. Or the uncertainty might arise from other causes; the legatee might be so imperfectly described that it was impossible to ascertain who he was; there might be two or more persons answering the description and no evidence to distinguish between them. In that case the law did not divide the legacy between these two or more persons, but again held that the legacy failed, and that the amount fell into the residue.

Now what difference is there in principle between the cases I have mentioned and the cases which have been alluded to by the Lord Chief Justice? Take the case of a candle falling on the will and obliterating the name of the legatee; why should there be more difficulty in the court granting probate with the name omitted by reason of a candle, or a chemical liquid, having fallen upon it after the death of the testator, than by reason of the illegibility of his handwriting, or of the uncertainty from the description of the will who the legatee was? There is no difference as to the intention; in all the cases there is a primary intention which is defeated, and a secondary intention to which effect is given. It appears to me there is no difference at all 235] in principle. *But is there any difference where the loss of legacies arises, not from actual obliteration upon the

face of the will itself, but from obliteration from the tablets of the memory, so to speak, of the witness whose testimony is admitted as secondary evidence of the contents of the will? It seems to me that in principle it can make no difference whatever, and, therefore, that there is no objection upon this ground in granting probate as regards the personal estate. Lastly, it appears to me that there are numerous decisions in the old ecclesiastical courts, which would be followed in the present Court of Probate, confirming this view—I mean those cases, many of which are reported, in which probate has been granted of a will, although it was proved that one or more codicils had existed also. In other words probate has been granted of part of the whole testamentary instrument, because the will and codicils together make the testamentary instrument, and it does not matter for this purpose whether it is a portion of the will or a portion of the codicil which is lost. I may mention that there are also decisions by which probate has been granted of a codicil or codicils although the will itself was lost. Therefore, those decisions show, that the mere fact of its being known that a portion of the testamentary instrument is wanting is not sufficient to prevent the court from granting probate of that which is left, it being satisfied that what is left is substantially correct so far as it goes. I think this disposes of the argument as to intention as regards the personal estate.

As regards the real estate, the matter stands upon a somewhat different footing; as to that we have, assuming that the evidence is to be relied upon, limitations of the real estate, which are perfect, so far as they go. As regards what have been called the principal estates, which are, in a sense, attached to the peerage, all Miss Sugden says is that there were limitations after those she has mentioned amongst the testator's family, but as there were seven life estates, followed by limitations in tail, it seemed so absurd to think of the ultimate remainders that she says, "I never thought much about it." So that what is missing is something which, if it existed, and could be proved, would damage the heir-at-law to the extent to which these subsequent limitations could take effect, but the omitting them from the probate cannot, as I have said *before, injure him, but must [236 benefit him. It does not seem to me, therefore, that he can have any ground of complaint at there not being any residuary devises as regards these estates.

As regards the other properties which are given over on failure of the prior limitations, if we were at liberty to con-

jecture, we might say it was strange that the whole of the properties were not to accompany the peerage, but upon this point Miss Sugden's evidence is positive, and she has not been further questioned about it. She says, as to Kingsdown, Boyle Farm, and Peasemore, that they were left in the manner she mentions on failure of the prior limitations, and that the limitations which she does not remember had reference only to the other estates. Therefore, in the present state of the evidence, there is no gap to be filled up, as regards any of the estates, except those which were primarily to accompany the peerage.

But it was said that we ought not to grant probate as to the real estate by reason of the change which has taken place in the law of probate since the passing of the Probate Act. I by no means accede to that argument. The Probate Act did not really change the law on the subject; it only enabled a tribunal created by that act to grant probate of wills of real estate, and it did nothing more. The 62d section of the act says that where a will is proved in solemn form, or its validity otherwise decided upon, the decree of the court is to be binding upon the persons interested in the real estate, and then the 63d section says, that unless the heir is cited he is not to be bound. Now, what is the effect of that? No doubt it enabled the Court of Probate, and of course it enables the High Court of Justice now, as the successor of that jurisdiction, to bind the heir by proving the will in solemn form, but that was not new; the Court of Chancery always did bind the heir by establishing a will in a suit properly instituted. It no doubt established it, after a trial in solemn form, which was called an issue *devisavit vel non*, but which was as much an issue of the probate of real estate against the heir as the probate granted by the Probate Court when the will is proved in solemn form and the heir cited. The act did not make an alteration of the law, it only empowered another tribunal by a similar, and 237] nearly identical, procedure, to establish a *will against the heir at the same time that it established a will against the next of kin, and that was all. And, indeed, so clear is that, that the Court of Chancery, so long as it existed, retained its ancient jurisdiction of establishing a will against the heir, and, in cases where the will related only to real estate, you must have had recourse to the Court of Chancery, as you must now have recourse to the Chancery Division of the High Court, which has inherited, so to speak, the jurisdiction of the Court of Chancery. In fact, as all real prop-

erty lawyers know, in ancient times it was customary for great landed proprietors to make, not only separate wills of real and personal estate, but several wills of real estate. I have seen as many as three ancient wills of different portions of the real estate of the testator, devoting an estate to different purposes. One might devote a portion of the real estate to a charity—that would be a separate will—another might give an estate to one devisee, and a third might give another estate to another devisee. If the testator intended to found two families, he was often desirous that his will should accompany the muniments of title to his estate, and, therefore, he made separate wills. If a testator made a separate will of personal estate, then you could not, even under the Probate Act, have gone to the Court of Probate, but you must still have had recourse to the Court of Chancery, to establish the will as regards the real estate. It appears to me, therefore, that the Probate Act has no bearing whatever on the question we have to decide, and, if it would have been right before that act to establish a will in the Court of Chancery, it would be equally right after it to grant probate of the will as to the real estate. Now, it was not contested that before the Probate Act you could have proved a devise to a plaintiff, who claimed an estate in ejectment, independently of the other devises in the will. He had nothing whatever to do with the other devises. If he claimed a gift of Blackacre in fee by the will, and brought ejectment, all he had to prove was a good will of Blackacre, or if he claimed as tenant for life only, all he had to prove was that there was a good gift of Blackacre to him for life, and it was immaterial, so far as he was concerned, that the rest of the will had been eaten by rats, as happened in one case, or destroyed by fire, as happened in another, or torn up by a person who thought himself injured by it, as happened in another reported case, because he had dis- [238 charged himself as regards the proof, when he had shown that the will, as regarded the property he claimed, was a valid testamentary instrument. If that is once admitted, it appears to me we ought to have no difficulty in establishing a will to the extent to which it is proved by evidence, leaving the ultimate limitations to be established if the real will should ever be discovered, and this is the form of probate which has been granted in the present case. Therefore, in this respect, I think the decree appealed from ought to stand, although it is quite true there are some

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limitations, the exact terms of which we are unable to discover. That disposes of the second point.

The third point is also one of great importance. Can we admit, as a matter of course, secondary evidence in proof of a will? I should have thought that there could be but one answer to that question; and had it not been for the doubt thrown out by a very eminent judge, in the case of *Wharram v. Wharram* (¹), I should have thought it impossible to argue the question. The object of secondary evidence is to supply the loss of primary evidence by accident or otherwise. It was felt, at a very early period of the establishment of courts of equity, that it was a great grievance that by the then rules of procedure of the common law a plaintiff could not recover on a lost deed; it was not a rule of the common law, but a rule of the procedure of the common law, which required him to make proof of it in his plea. But where the deed had been lost the court of equity interfered, and allowed the plaintiff to produce secondary evidence of it. He was allowed to prove, by other evidence than the deed itself, the existence and the execution of the deed, and its contents. After a time the courts of common law altered their procedure—as I said before, not the law, but the procedure—to enable the plaintiff in a common law action to obtain the same advantages as he could previously have obtained only in equity. But the whole theory of secondary evidence depends upon this, that the primary evidence is lost, and that it is against justice that the accident of the loss should deprive a man of the rights to which he would otherwise be entitled. I am at a loss to discover any reason whatever for distinguishing between the loss of a will 239] and the loss of a deed. If it is said that *a will requires execution and attestation, a deed requires execution and delivery, and you could not establish a deed until you had shown that it had been executed, that is, sealed, and delivered. These were the peculiar formalities as regarded a deed. As regards some deeds such as deeds in exercise of powers, attestation was commonly required, and as regards those deeds everything that would be required in the case of a will may be proved by secondary evidence. You must prove, then, not only execution, but that the deed of appointment was duly attested. Therefore, on principle, there is, as it seems to me, no possible distinction to be suggested between the proof of a deed and the proof of a will. Besides this, there was a long course of undisputed authorities all pointing in the same direction. No

(¹) 3 Sw. & Tr., 301; 33 L. J. (P. M. & A.), 75.

one had doubted, until the case of *Wharram v. Wharram* (*), that you could prove a will by secondary evidence, but a doubt was then suggested whether that could be allowed after the passing of the new Wills Act. It seems to me, however, that this is not a question of the requirements of the act, because there was nothing new in the act in respect of the execution of wills of real estate, except that the legislative requirements were diminished. The Statute of Frauds not only required signature, but required the attestation of three witnesses to pass real estate by will. By the new Statute of Wills that was reduced to two witnesses, and there was no other difference, except in the case of the signature, between the requirements of the Statute of Frauds and the requirements of the new Wills Act. Therefore, if you could have proved a will by secondary evidence before that act, there is no reason, that I can see, why you should not be able to prove it in the same way after.

As regards personal estate no doubt there was a difference, because before the statute if a will had not been in writing or signed, there was the possibility of saying that that which is called evidence of the will was the will itself; but even that was not quite accurate, because our law required the best evidence, and when the will was in writing, and was not produced, it was not proved unless secondary evidence was let in. Therefore, in that case also the decisions which let in secondary evidence went to prove that you could have secondary evidence of a will.

*It appears to me therefore clear, both on principle [240 and authority, not forgetting especially the case of *Brown v. Brown* (*), which the Lord Chief Justice mentioned, that secondary evidence can be admitted to prove the contents of a lost will.

The next point, and one no doubt also of great importance, is what secondary evidence is admissible. In this particular instance there is the evidence of a person who had seen the will, and the real point to be considered and decided is whether that evidence can be confirmed or corroborated by declarations of the testator made, either to that witness or to other persons, and if so, whether those declarations to be admissible in evidence must be limited to declarations made at or before the execution of the will, or may be extended to declarations made after the execution of the will.

Now, it might well have been that our law, like the law

(*) 3 Sw. & Tr., 301; 33 L. J. (P. M. & A.), 75. (†) 8 E. & B., 876; 27 L. J. (Q.B.), 178.

of some other countries, should have admitted as evidence the declarations of persons who are dead in all cases where they were made under circumstances in which such evidence ought properly to have been admitted, that is, where the person who made them had no interest to the contrary, and where they were made before the commencement of the litigation. That is not, however, our law. As a rule the declarations, whether in writing or oral, made by deceased persons, are not admissible in evidence at all. But so inconvenient was the law upon this subject, so frequently has it shut out the only obtainable evidence, so frequently would it have caused a most crying and intolerable injustice, that a large number of exceptions have been made to the general rule.

I will consider, first, what the exceptions are, and what is the principle which guides the court in making exceptions. The exceptions are generally considered to be three principal and three subordinate exceptions. It does not matter in what order I take them. First, there is an exception of a declaration accompanying an act; secondly, of a declaration against interest; and, thirdly, of a declaration made by a person in the course of business, one which it was his duty to make. Those are three large exceptions.

There are then some smaller exceptions; the first is the 241] proof *of matters of public and general interest, one might say of *quasi* historical interest, not actually historical, where we admit the declarations of persons who may from their position be fairly presumed to have had knowledge on the subject.

In the next place, we admit evidence which is in its nature very weak indeed, that is in matters of pedigree, where we admit declarations of deceased members of a family, on its being shown that the persons were members of the family.

Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favor of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favor. Lastly, and this appears to

me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases.

Now, all these reasons exist in testifying both as to matters of public and general interest, and as to matters of pedigree, and some, if not all of them, exist in the other cases to which I have referred. They all exist in the case of a testator declaring the contents of his will. Of course, as in the case of pedigree, the courts must be cautious in admitting such evidence. From its very nature it is evidence not open to the test of cross-examination, it is very often produced at second or third hand, and it is therefore particularly liable to lose something of its color in the course of transmission. It is so easily and so frequently fabricated that all courts which have to dispose of such cases must be especially on their guard.

But that goes only to the question of the weight to be attributed to the evidence when admitted, it does not go to the question of admitting the evidence itself; and I must say it appears to me that, having regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases to which I have referred, we should be equally justified *and equally [242 bound to admit it in this case. When I say equally, perhaps I state the case a little too low, because if there is any case in the world in which it is incumbent upon a tribunal not to grant a premium for fraud or wrong; not to hold out to the world that any man who is able to get hold of the will of a testator which may disappoint him of his expectations, just or unjust, if he once destroys it, shall be able to acquire the property either for himself or for those whom he wishes to benefit,—I say if ever there was such a case it is the case of a lost will. The court should be anxious, not narrowly to restrict the rules of evidence, which were made for the purpose of furthering truth and justice, but, guided by those great principles which have guided other tribunals in other countries in admitting this kind of evidence generally, to admit it at all events in the special case which we have under consideration.

I, therefore, entirely concur in the Lord Chief Justice's conclusion that this evidence is admissible, not only as regards that portion of it which is anterior to the execution of the will, but also as regards that portion of it which is posterior to its execution. As regards the portion of it anterior to the execution, it has been admitted, where it

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has been admitted at all, on a somewhat different ground. It is not strictly evidence of the contents of the instrument, it is simply evidence of the intention of the person who afterwards executes the instrument. It is simply evidence of probability—no doubt of a high degree of probability in some cases, and of a low degree of probability in others. The cogency of the evidence depends very much on the nearness in point of time of the declaration of intention to the period of the execution of the instrument. Now, in this case we have that link supplied in the most satisfactory manner as regards the two important documents "J" and "K." We have the evidence of the witness that they were, to use her words, jotted down at the time when the will was being written, and therefore immediately before the execution, and in that case it is not to be presumed for a moment that there was any change in the intention of the testator from the time of jotting down his legacies to the time when he signed the will. As regards the earlier document, no doubt that relates to a prior will, the will of 1867, 243] but we have the evidence of Miss *Sugden that that will was incorporated with the second will, and therefore to that extent it brings the evidence down to the time of the execution of the second will.

We must also remember that these documents were carefully preserved by the testator; that they were tied up with other documents in the same box which contained his will and codicils, and that it is not likely he would so carefully have preserved them if he had changed his intention between making them and signing his will. If they had no longer represented his final intention he would probably have destroyed them or thrown them away as waste paper. That confirms, to my mind, the value of the documents—that although only evidence of intention, yet they are evidence of intention not changed at the time of the execution. Upon these documents, I think, whatever view may be taken as regards the latter one, full reliance ought to be placed.

Then I come to the question whether, irrespective of the post-testamentary declarations, as I may call them, there would be any ground for saying that there was not sufficient evidence to sustain the proof of this will. I am clearly of opinion there is no such ground. It happens fortunately in this case that these post-testamentary declarations are of comparatively little value. In the only instance in which confirmation is required they are very vague and general. That instance is the share of the residue given to Miss Sugden.

Now, in considering the last point as to the sufficiency of the evidence, I will take the case first irrespective of these post-testamentary declarations which the learned judge in the court below felt himself bound, as I think he was bound, by the decision in *Quick v. Quick* (') to disregard, and I must say I should entirely concur with the learned judge in his conclusion, even assuming that I was bound, as he was, by the decision in *Quick v. Quick* ('), to disregard that evidence. But how does the matter stand? The will was read frequently, and under peculiar circumstances of interest, by Miss Sugden. She had not only an opportunity of becoming familiar with its contents, but she had the strongest motive for doing so. The will concerned not only herself, but *those who were nearest and dearest to [244 her. It would be no idle curiosity which would induce her to read it and re-read it with attention, and to remember its contents with accuracy and fidelity.

Therefore we have the evidence of a witness to be trusted beyond the average of witnesses, more to be trusted even in this respect, supposing there were no question of interest, than an ordinary solicitor who testifies to the contents of a will. He has other affairs to attend to, he has many wills to read, and he has no special or particular interest in the disposition of the property of the testator. Therefore we have a witness peculiarly likely to know what the contents of the will were.

Besides that, we have a witness of unimpeached and unimpeachable integrity. We have the gratification of knowing, in deciding this case, that there has been no question raised as to the credibility of Miss Sugden, and this appears to be an answer to that assumed danger which might apply to other cases in allowing such proof as this to establish wills. The present case has, in my opinion, nothing to do with a case where the credibility of the witness is contested; it does not make the witness's testimony more admissible, but it does add enormously to the weight of it, when you find that the opponent does not dispute the honesty and truthfulness, the entire integrity and veracity of of the witness.

The case is singular in that respect, and I should think it is very likely to remain singular, as regards subsequent cases; therefore there is no danger in admitting this evidence in this particular case, and I see no reason why we should refuse to do justice now because other persons, not

(') 3 Sw. & Tr., 442; 38 L. J. (P. M. & A.), 146.

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credible witnesses, may be induced in other cases to attempt to substantiate fictitious wills.

But, no doubt, this observation may be made—that Miss Sugden is an interested witness. Here again it is not alleged that the interest is such as to impair her credibility. If it had been, I could have understood the objection, but as it is admitted that she is a veracious person, the objection as to interest fails. The law at one time considered it impossible that a person biassed by the smallest interest could tell the truth, but that law was found so utterly opposed 245] to human experience that it was abrogated by *the Legislature, and interested witnesses daily give evidence in our tribunals, and, subject to the observation that they may be biassed by their interest so as to some extent to affect the weight of their testimony, their evidence is received without doubt or question. No doubt, in the case even of a credible witness, even in the case of a witness without interest, it is desirable, if possible, to procure confirmation to show the accuracy of the memory of the witness, and for that purpose only. But the moment you admit the witness to be credible, the desirability of the confirmation appears to me to apply just as much to that portion of the evidence as to which he is not interested as to that in which he is.

Now, as regards the evidence of Miss Sugden, she is confirmed in every material respect, except as to the residue of the personal estate. I am not going to repeat the elaborate judgment which has been already given as regards the nature of the evidence, but I will take that to be sufficiently established.

As regards the residue, if you shut out the post-testamentary declarations, there is no actual confirmation except one, that is, the confirmation of probability.

Now, I must say that in testing the unsupported testimony of a witness, especially of an interested witness, the position of the testator, and the probability of the disposition which he is said to have made, appear to me to be important elements; and how stands the matter here as far as these are concerned? I am not in a position to give accurate figures, although I have done my best to ascertain the value, and, therefore, what I am saying must not be considered to be quite precise, but from the statement made to us, and which was made in the court below, I should imagine that the testator died possessed of property worth about £300,000, probably more, but not less. He is said to have had between £7,000 and £8,000 a year in freehold estates, and about £60,000 in personalty, or thereabouts. The state of his family was this: he had had a great number

of children; all his daughters were married except one, and all his sons were dead except one, although two of the sons had left a child or children. Of all his children, that one single daughter remained with him, and she was, one might say, the prop and solace of his life. That he entertained a great, and, *one might say, a deserved affection for her, is clear, from all the testimony we have had before us; that it was his moral duty to provide for her, and to put her in a situation of life such as not greatly to diminish her habits of comfort, or even of luxury, is plain and beyond controversy. Whether he had promised to do so or not does not appear to me to be material; but it is clear he had promised to do so, even before the making of the last will.

Under those circumstances, what does she take by the interest, or rather combination of interests, given her by the will? There, again, my figures are probably not accurate, although they are as nearly accurate as I can make them. She takes a portion of £6,000, which, although it is more than some of her sisters seem to have had, appears to have been calculated with the view of making her equal in that respect with the most favored of them, although not beyond. Of course, it is perfectly natural that the testator should desire that the unmarried daughter should be at least as well provided for as the married daughters were on the occasion of their marriages; and upon this there is confirmation. She takes a life interest in a farm which is stated to be worth £350 a year. I am not acquainted with the exact age of Miss Sugden, but she can be no longer very young; and I take the value of her life interest in that farm to be considerably less than £3,000. She takes a house which appears to have cost £1,500, and some meadows, the exact value of which does not appear, but which again I say £3,000 may very fairly represent. That makes £12,000; and she takes, besides, one-third of the residue, the exact amount of which again does not appear. Of course there are large legacies to be deducted from it, and I should think £10,000 or thereabouts would fairly represent the one-third. But assuming it to be £13,000, which is a very large figure, considering the deductions to be made, then you have not more than £25,000 as the provision made for this lady, who stood in the relation I have mentioned to a testator possessed of this considerable fortune. I think it is not only reasonable to presume that he would have made this, which appears to be by no means an immoderate provision for her, but he would, as I think, have sinned in his grave

247] *if he had done otherwise than make such a provision for the child who had devoted to him her whole life.

I think, therefore, she is amply confirmed, and that the extent of the benefit which he intended for her has not been exaggerated by her in her testimony, and this is the only point on which there was no other confirmation. Therefore, if I threw out of consideration the post-testamentary declarations, I should have arrived at the same conclusion. But if we admit them, they point still more strongly to the same conclusion. The testator is proved to have told one person that his daughter would be a rich woman, and be able to receive in the same manner as she had done in his lifetime. He told another person that she would be a wealthy woman after his death; he told her, in terms which are affecting, no doubt, and even pathetic, in speaking of her devotion to him, that she was blessed, and ought to be blessed by him as regards the disposition of his property. Can we say that these expressions of the testator have been more than fulfilled by what I may call the modest provision he has made for her by the testamentary instruments which have been admitted to probate, a provision which, in all probability, if there had not been a title in the family, would have been very much larger?

On the whole, I express my entire concurrence in the judgment which my Lord has given, and I agree with him also that, after the careful and elaborate investigation which this case underwent in the court below, after the clear, luminous, careful and elaborate judgment which was given by the distinguished judge of that court, the heir-at-law and next of kin would have done well and wisely in abstaining from pressing an appeal to this court. I think that as they have chosen to do that, they ought to bear the penalty to which all unsuccessful litigants are liable, and that in dismissing this appeal we ought to dismiss it with costs.

JAMES, L.J.: I agree so entirely with the judgment of the Lord Chief Justice, both in the conclusions at which he has arrived and in the reasons which he has given for those conclusions, that I do not think it necessary to make more than one or two short remarks.

248] *First, I would corroborate what he has said with regard to the admission to proof of part of an instrument where the rest is not forthcoming, by referring to the case of *Dickinson v. Stidolph* (¹), where the judgment of the court, consisting of the Lord Chief Justice Erle, Mr. Justice Williams, Mr. Justice Willes, and Mr. Justice Byles, was

(¹) 11 C. B. (N.S.), 341.

delivered by Mr. Justice Williams, probably the most eminent authority in our time on matters connected with wills. In the judgment there are the following expressions: "Secondly, it was objected that the testatrix refers to two memorandums, and only one is found. But, if she intended to adopt two instruments, and only one is found, the law requires that effect should be given to that which is found; for either the ordinary presumption must prevail that the missing paper was destroyed by the testatrix *animo revocandi*, or the principle must be applied that the apparent testamentary intentions of a testator are not to be disappointed merely because she made other dispositions of her property which are unknown by reason of the testamentary paper which contained them not being forthcoming. It is on this principle that a subsequent will is no revocation of a former one if the contents of the subsequent will are unknown. And the law is the same even if the later will be expressly found to be different from the former, provided it be unknown in what the difference consists." That is upon the point as to whether probate can be granted of a will of which only a part is known.

With regard to the testamentary declarations of the testator, I desire to say that I entirely concur in the conclusion at which the Lord Chief Justice has arrived, that those testamentary declarations are admissible and ought to be admitted as evidence. But in this case it is conceded that every one of those declarations was admissible and was properly admitted for some purpose in the cause, and thereby those declarations of the testator have become legitimately known to me. I believe them to have been made by him, and I believe them to be true, and, having those declarations before me and so believing them, it would be a judicial lie if I were to pretend that I did not act upon them in coming to the *conclusion that the evidence [249 of the witness as to the actual contents of the will is true.

MELLISH, L.J.: I am also entirely of the same opinion; and I think it is quite unnecessary that I should make any lengthened observations.

The really material questions are, of course, the two questions of fact, what are the contents of the will, and whether that will has been proved; and upon those two main important questions I am perfectly satisfied with the judgment of the judge of the court below; and I am also entirely satisfied with the reasons which have been given by the Lord Chief Justice and the Master of the Rolls here, and I say nothing more about them.

I am also entirely satisfied with the reasons which have been already given upon the question of law, whether probate of that portion of the will of which we have evidence ought to be refused, because there may be some other portions upon which we have not sufficient or any evidence. But that question, to my mind, scarcely arises in this case; because, with regard to the parts of the will that are omitted, it seems to me that we have satisfactory evidence that they did not substantially alter the provisions of which we have evidence.

With reference to the personal estate, there is no reason to suppose that any of the missing legacies, if there are any, of which we have no evidence, were given to the next of kin, that is, to the relatives of the testator. He had put down on the paper of which we have evidence the legacies which he intended to give to the different members of his family. The next of kin were all represented by counsel, and no one asked Miss Sugden whether she was confident that there were no legacies given to them, and I think I can clearly come to the conclusion, as a matter of fact, that, whatever the small legacies may have been, of which we have no evidence, they were not legacies to any members of his family, and, therefore, no one can possibly be prejudiced, except those persons, whoever they may be, of whom we have no evidence, and who will get no benefit whatever. No one can be prejudiced by our granting probate of the will so far as we know it.

250] *I do not at all mean in making that observation to throw any doubt on the judgment which has been given by the Master of the Rolls, and the reasons which he has given why probate of a gift of residue ought to be granted, even although we might not know the nature of the legacies of personal estate contained in the part of the will of which there was no evidence. And as to the real estate, it is perfectly plain that whatever omissions there may have been of the ultimate limitations, those omissions cannot possibly be any prejudice to the heir-at-law.

The only part of the case upon which I have any doubt, or differ at all from what has been already said, is a part which, as it appears to me, is not before us, and which it is not really necessary for us to decide. At the time of the argument, not having read the judgment of the President of the Probate Division, I was under the impression that he might have relied to some extent upon the evidence of the declarations of Lord St. Leonards respecting the contents of his will made after its execution. But, having now carefully

read through the judgment, I find that he did not rely upon that evidence at all. In determining what were the contents of the will he did not rely upon, he carefully avoided mentioning any of the statements of Lord St. Leonards respecting the contents of his will, and, for myself, I am entirely satisfied with the conclusion to which he came upon that ground. I do not think it necessary for us to consider whether those subsequent declarations are admissible. I am not myself prepared to say that the decision in *Quick v. Quick* (1) is bad law. If I was asked what I think it would be desirable should be evidence, I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was that all statements made by persons who are dead respecting matters of which they had a personal knowledge, and made *ante litem motam*, should be admissible. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence. But the difficulty I feel is this, that I cannot satisfactorily to my own mind find any distinction between the statement of a testator as to the contents of his will, and any other statement of a deceased person as to any fact peculiarly within his knowledge, which, beyond all *question, as the law now stands, we are not as a [251] general rule, entitled to receive.

The Master of the Rolls has referred to the several exceptions which have been made to the rule, but none of them appear to me to be applicable to this case. I think there is a most material distinction, as was pointed out by Lord Campbell in *Doe v. Palmer* (2), between declarations made before a will is executed, and declarations made subsequently. The declarations which are made before the will are not, I apprehend, to be taken as evidence of the contents of the will which is subsequently made—they obviously do not prove it; and wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were. When a doubt is thrown on the correctness of evidence which has been given as to the contents of a will, the declarations of the testator as to what he intended to put in his will, made either contemporaneously with, or prior to the execution of, his will, are obviously evidence which may corroborate the other testimony as to what is contained in the will.

(1) 8 Sw. & Tr., 442; 38 L. J. (P. M.). (2) 16 Q. B., 747; 20 L. J. (Q.B.), 367. & A., 146.

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But, to my mind, they do not of themselves prove what were the contents of the will, they only corroborate the other evidence which has been given of the contents, because it is more probable that the testator has than that he has not made a particular devise, or a particular bequest, when he has told a person previously that he intended to make it, inasmuch as it shows that he had it in his mind to make such a will at the time he made that declaration. But a declaration after he has made his will, of what the contents of the will are, is not a statement of anything which is passing in his mind at the time; it is simply a statement of a fact within his knowledge, and therefore you cannot admit it unless you can bring it within some of the exceptions to the general rule, that hearsay evidence is not admissible to prove a fact which is stated in the declaration. It does not come within any of the rules which have been hitherto established, and I doubt whether it is an advisable thing to establish new exceptions in a case which has 252] *never happened before, and may never happen again, for you then establish an exception which more or less throws a doubt on the law. It appears to me that it would be better to leave it to the Legislature to make the improvement, which, in my opinion, ought to be made, in our present rules with regard to the admissibility of evidence of that description. In all other respects I entirely agree with the judgments which have been given.

BAGGALLAY, J.A.: The judgment which has been pronounced by the Lord Chief Justice so completely expresses the opinions which I have formed on the several questions which have been raised in the course of the argument on this appeal, that I shall abstain from saying more than that I entirely assent to that judgment, not only as regards its general conclusions, but as regards its details, and I particularly desire to express my concurrence in that portion of the judgment which has reference to the admissibility, as evidence, of the declarations made by the testator in this case, and to the unsoundness of the decision in *Quick v. Quick* (').

COCKBURN, C.J.: The appeals will be dismissed with costs.

Appeals dismissed.

Solicitors for plaintiffs: *Trollope & Winckworth.*

Solicitors for defendants: *Barlow, Bowling & Williams.*

Solicitors for interveners: *W. W. Gabriel; R. S. Taylor & Son.*

(') 3 Sw. & Tr., 442; 33 L. J. (P. M. & A.), 146.

See 5 Eng. Rep., 583 note; 14 Eng. Rep., 586 note; 1 Redfield on Wills, (4th ed.), 302-332; 3 id., 15-18; 1 Williams on Executors (6th Am. ed.), 159, 378-380, 360 note (m), bottom pagings; Browne on Probate, 119, 310.

Statutes similar to those of the state of New York probably exist in most of the states. A consideration of those and of the decisions under them will enable the practitioner to readily ascertain, with the cases in his own state, the law upon the subject.

By the statutes of New York (2 R. S., 67, §§ 63^b-67^b inclusive, 2 Edm. Stat., 69, 3 R. S., 6th ed., 71, § 95, *et seq.*), it is provided:

§ 63^b. Whenever any will of real or personal estate shall be lost or destroyed, by accident or design, the court of chancery shall have the same power to take proof of the execution and validity of such will, and to establish the same, as in the case of lost deeds.

§ 64^b. Upon such will being established by the decree of a competent court, such decree shall be recorded by the surrogate, before whom the will might have been proved, if not lost or destroyed, and letters testamentary, or of administration, with the will annexed, shall be issued thereon by him, in the same manner as upon wills duly proved before him.

§ 65^b. If before, or during the pendency of, an application to prove a lost or destroyed will, letters of administration be granted on the estate of the testator, or letters testamentary of any previous will of the testator be granted, the court, to which such application shall be made, shall have authority to restrain the administrators or executors so appointed, from any acts or proceedings, which it may judge would be injurious to the legatees or devisees claiming under such lost or destroyed will.

§ 66^b. The three last sections shall extend to wills of real and personal property already executed.

§ 67^b. No will of any testator who shall die after this chapter shall take effect as a law shall be allowed to be proved as a lost or destroyed will, unless it shall be proved to have been in existence at the time of the death of the testator; or be shown to have been fraudulently destroyed, in the lifetime of the testator; nor unless its provisions shall be clearly and distinctly

proved, by at least two credible witnesses, a correct copy or draft being deemed equivalent to one witness.

The probate court has no jurisdiction to establish a lost will. Its order establishing and probating the same, and all proceedings had thereunder, are void, and may be impeached collaterally: *Waggener v. Lyles*, 29 Ark., 47.

Upon the proving of a will before the surrogate, he has jurisdiction and power to receive proof that such will was revoked by a subsequent will of the testator; and that such subsequent will has been fraudulently destroyed, or that it was destroyed by the testator when his mind had become so far impaired that he was incompetent to perform a testamentary act.

But the chancellor alone has the power to take proof of the will, which was thus destroyed, for the purpose of establishing it as a testamentary disposition of the property of the decedent.

In resisting the probate of an instrument propounded as the last will and testament, his heirs and next of kin have the right to introduce any testimony which will be sufficient to satisfy the surrogate that the instrument propounded was not in force, as a valid will, at the death of the testator named therein: *Nelson v. McGiffert*, 3 Barb. Chy., 158.

The jurisdiction of chancery to establish a lost will is well settled: *Morris v. Swaney*, 7 Heisk. (Tenn.), 591; *Brown v. Brown*, 10 Yerg. (Tenn.) 84; *Buchanan v. Matlock*, 8 Humph. (Tenn.) 390; 1 Sto. Eq. Jur., § 184 and note 1; *Tupper v. Phipps*, 3 Atk., 360.

But see, in *South Carolina*, *Myers v. O'Hanlin*, 13 Rich., 196.

As to the right of a court of equity to interfere in case where a will in existence was procured by fraud, see *Broderick's Will*, 21 Wall., 503; 13 Eng. Rep., 103 note; *Abbott v. Fraylor*, 11 Bush (Ky.), 335; *Archer v. Meadows*, 33 Wisc., 166.

The power of courts of equity to establish a lost or destroyed will, is restricted by the express terms of the statute to the cases therein mentioned, and can only be exercised in the two cases specified, viz.: 1, when the will shall be proved to have been in existence at the time of the testator's death; or 2, when it is shown to have been destroyed fraudulently in the lifetime

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of the testator : Timon v. Claffy, 45 Barb., 438, 443, affirmed 41 N. Y., 619, *sub nom.* Conroy v. Claffy.

Where a will is admitted to probate on the ground that the original will has been destroyed, the omission of the record to state that the destruction of the original will was subsequent to the death of the testator, does not render the order admitting such will to probate void ; and on the trial of the issue, in a suit to contest the validity of such will, such order is entitled to the same *prima facie* effect, as the statute gives to an order probating an original will : Converse v. Starr, 23 Ohio St. Rep., 492.

If a will, once known to exist, is not found at the death of the testator, it is presumed to have been revoked : Newell v. Homer, 120 Mass., 277 ; Betts v. Burns, 6 Wend., 173, reversing 9 Cow., 208 ; Idley v. Bowen, 11 Wend., 227 ; Bulkley v. Redmond, 2 Bradf., 281 ; Holland v. Ferris, 2 Bradf., 334 ; Welch v. Phillips, 1 Moore, P. C., 299 ; Gilpin v. Chandler, 2 Del. Chy., 219 ; Podmore v. Wharton, 3 Sw. & Tr., 449.

See Jackson v. Betts, 6 Cowen, 877, 9 Cowen, 208 ; Gilpin v. Chandler, 2 Del. Chy., 219.

The presumption that a will which was in a testator's custody up to the time of his death, and cannot be found after his death, was destroyed by him *animo revocandi*, does not apply to a case where the testator became insane after the execution, and continued insane until his death. In such a case the burden of showing that the will was destroyed whilst the testator was of sound mind lies on the party setting up the revocation, and in the absence of evidence as to the date of the destruction the contents of the will are entitled to probate : Spriggs v. Spriggs, L. R., 1 Prob. and Div., 608.

Letters of administration on the estate of the deceased, as an intestate, having been issued, and some of the next of kin having applied for a revocation thereof on the ground that the deceased left a will ; and it appearing that a will had been executed, but there being no proof that the will was in the possession of the deceased, or unrevoked at the time of his death : Held, that when administration has been granted, and an existing will or a will lost or fraudulently destroyed is

alleged but not proved, it is generally improper to revoke the letters.

If a will, proved to have been executed and to have been in the possession of the decedent, cannot be traced to the custody of another or cannot be found, the presumption of law is, that it has been destroyed *animo revocandi* : Holland v. Ferris, 2 Bradf. Surr. Rep., 334.

Proof that a will executed by a deceased person was said by him, a month previous to his death, to be in his possession in a certain desk at his house ; that he was then very aged and feeble ; that his house keeper was a daughter having an interest adverse to the will, and that the same could not be found on proper search three days after his death, is not sufficient evidence of its existence at the testator's death, or of a fraudulent destruction in his lifetime, to authorize parol proof of the contents : Knapp v. Knapp, 10 N. Y., 276 ; Schultz v. Schultz, 35 N. Y., 655 ; Idley v. Bowen, 11 Wend., 227.

Where a will was duly executed by the deceased and left in the possession of his counsel, and, a few months after, the testator sent for it, avowing the purpose of destroying it, and a day or two subsequently stated that he had destroyed it : Held, that although the facts raised a presumption that the will had been destroyed by the deceased, it was proper to examine his papers for the purpose of ascertaining whether the instrument had in fact been cancelled.

The fact that the decedent died intestate must be proved before letters of administration issue ; and that is ordinarily shown by establishing that no will can be found.

A lost or destroyed will cannot be proved in the surrogate's court ; but jurisdiction in such case belongs to the Supreme Court.

The grant of letters of administration does not preclude any party in interest from instituting proceedings in the Supreme Court to establish a will lost, or destroyed by accident or design ; and on the will being proved there, the letters of administration will be revoked.

When the will is last traced to the possession of the testator, and on his decease, after examination of his papers, and proper inquiry of the persons in his confidence and about his

person during his last sickness, it cannot be found, the presumption is that it was destroyed by the testator, *animo revocandi*.

A will cannot be proved as a lost or destroyed will, unless it is shown to have been in existence at the death of the testator, or to have been fraudulently (or accidentally) destroyed in his lifetime: *Bulkley v. Redmond*, 2 Bradf., 281.

Where a will has been lost or destroyed, under circumstances showing that it has not been lost or destroyed with the knowledge or consent of the testator, the fact of its legal existence at the death of the testator may be proved by circumstantial testimony.

Where it is proved that the will, at the time of its execution, was placed by the testator in the hands of a custodian to keep, who testifies that he took charge of the same, and locked it up in a trunk, and supposed it was there at the time of the testator's death, but upon search for the same after his death it could not be found, the evidence of its legal existence, at the time of the testator's death, is sufficient under the statute.

If, under such circumstances, the will was not, in fact, in existence at the death of the testator, it becomes evident that it was fraudulently destroyed or lost during the lifetime of the testator; in which case, it was his last will and testament: *Schultz v. Schultz*, 35 N. Y., 653; *Clemens v. Clemens*, 37 N. Y., 77; *Podmore v. Whetton*, 3 Sw. & Tr., 449.

The execution of a will being proved, and there being no grounds to support the presumption that the testator destroyed it; the court decreed for the contents, on parol evidence, that the only next of kin had burned a material paper of deceased after his death, and boasted that its destruction benefited him, and admitted that it was the will of the deceased.

Admissions or declarations of third persons are evidence, where they constitute part of the transaction forming the subject of inquiry, or where the person making the declaration has a beneficial interest, and is a party to a suit depending: *Otley v. Otley*, *Milward's (Irish) R.*, 193.

A finding of a jury that a will was destroyed by the testator's wife at his

request, and that it was so destroyed in his lifetime and in his presence, and not fraudulently, necessarily precludes the establishment of such will as a lost or destroyed will, in the Supreme Court: *Timon v. Claffy*, 45 Barb., 438, affirmed 41 N. Y., 619, *sub nom.* *Conroy v. Claffy*.

The fraud in the destruction of a will must consist in some deceitful contrivance, device or practice to defeat the wishes and intent of the testator, in regard to his will. The fraud can only be alleged against him; for during his life no one else can have any vested rights or vested interests in a will to be affected by the fraud, and no one else can be defrauded until his death, by the destruction of his will: *Timon v. Claffy*, 45 Barb., 438, affirmed 41 N. Y., 619, *sub nom.* *Conroy v. Claffy*.

See *Schultz v. Schultz*, 35 N. Y., 656.

A testator has the right, while in the full possession of his faculties, to destroy his own will at any time, or in any manner he pleases; and no fraud can be committed by any person in destroying or assisting to destroy a will by the express direction and in the presence of the testator, though it be not done in the presence of two witnesses, so as to revoke it under section 42 of the statute: *Timon v. Claffy*, 45 Barb., 438, 41 N. Y., 619, *sub nom.* *Conroy v. Claffy*.

See *Schultz v. Schultz*, 35 N. Y., 656.

A complaint alleged the fraudulent destruction, during the lifetime of the testator, of certain clauses in his will, and prayed, among other things, that such clauses be restored and established as part of said will, setting forth such clauses and the beneficial interest thereunder of the plaintiff, who was neither heir at law nor next of kin to the testator:

Held, not demurrable, on the ground that it did not state facts sufficient to constitute a cause of action.

That the surrogate's court had no power to grant the relief; it could only grant letters of probate on a perfected will, but had no jurisdiction to establish a lost or destroyed will.

That although the statute (title 1, chap. 6, § 8 R. S.) refers to a "lost or destroyed will," it should have a liberal construction in furtherance of justice, and for the prevention of fraud;

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and the fraudulent destruction of a single item or clause, or distinct portion or provision of a will, must be considered as the destruction of a will by design under section 63, or fraudulent under section 67, if such destruction affects the disposition of the property of the testator in any essential particular.

That the court, under the provisions of the statute aforesaid, have ample power, upon due proof of the allegations of the plaintiff's complaint, to restore the destroyed or supposed portions of the will, and establish the same as it stood before the making of the codicil alleged to have been fraudulently procured; and the probate of such codicil allowed or made by the surrogate did not preclude such investigation and decision, or bind or affect the plaintiff upon such question in the prosecution of her action: *Hook v. Pratt*, 8 Hun, 102.

A will destroyed in the lifetime of the testator by the testator himself, acting under the undue influence of his son, may be admitted to probate, on establishing facts showing the existence and due execution of the will, and its destruction by reason of such undue influence. The testator himself, while under undue influence, may be made the instrument of improperly destroying his own will: *Voorhies v. Voorhies*, 39 N. Y., 463, affirming 50 Barb., 119.

Exaggeration of the conduct of a party benefited by a will, towards the testatrix, though it induce her to revoke the will, and the bequest made in his favor, and to execute another will to his exclusion, is not such a fraud as to destroy free agency, and render the will invalid. Neither does such conduct amount to undue influence or importunity: *Browning v. Budd*, 6 Moore, P. C., 430.

In a suit brought to establish a will the complaint must allege that it is lost or destroyed. If it allege that after the testator's death the defendant got access to his papers, and there found the will and got it into his possession, and "concealed, suppressed or destroyed the same," is insufficient upon demurrer: *Kaster v. Kaster*, 52 Ind., 531.

But see *Hall v. Gilbert*, 31 Wisc. 691.

All the parties in interest under the

alleged will should be made parties: *Grant v. Grant*, 1 Sandf. Chy., 235-6; *Hall v. Gilbert*, 31 Wisc., 391, 395; *Waggener v. Lyle*, 29 Ark., 51; *Story's Eq. Pl.*, §§ 72-8.

"Whenever any will shall be lost or destroyed by accident or design, the court of chancery shall have the same power to take proof of the establishment of such will, and to establish the same as in cases of lost deeds." The power of a court of chancery to establish lost deeds is one long recognized, and the practice under it requires that all those interested in the deed shall be made parties, and have notice of such proceedings": *Waggener v. Lyles*, 29 Ark., 51.

See *Vanderpoel v. Van Valkenburgh*, 6 N. Y., 190; *Walsh v. Ryan*, 1 Bradf., 433; *Odorn v. Thompson*, 1 Hawks (N. C.), 58; *Everitt v. Everitt*, 41 Barb., 385.

As to whether a determination in a suit by one party in interest would be conclusive upon other parties in interest not made parties to the first suit, see *Clemens v. Clemens*, 37 N. Y., 59; *Matter of Kellum's Will*, 50 N. Y., 298; 2 *Phillips's Ev.*, 78-80; *Campbell v. Logan*, 2 Bradf., 90; *Hill v. Burger*, 10 How. Pr., 264; 3 *Redf. on Wills* (2d ed.), 63-4; *Bigelow on Estoppel*, (2d ed.), 145-6, 160.

Practice, and rules of evidence, upon a proceeding under the statute, to establish the execution and validity of a will alleged to be lost or destroyed; and what will be deemed sufficient proof of the execution, and the provisions, of the will.

The proof of a lost or destroyed will proceeds upon the theory that it is not in existence and cannot be produced before the surrogate. Hence the case is one of secondary evidence exclusively.

Proof will also be received to supply the imperfection of memory of the subscribing witnesses.

A proceeding under the statute, to prove a lost will, is not within the spirit or the letter of the 52d section of the statute of limitations applicable to suits in equity, requiring bills for relief, in case of the existence of a trust not cognizable by the courts of common law, etc., to be filed within ten years after the cause of action shall accrue: *Everitt v. Everitt*, 41 Barb.,

885, 391-3, qualifying *Bowen v. Idley*, 6 Paige, 46; *Podmore v. Whatton*, 3 Sw. & Tr., 449.

As to what is sufficient evidence of the fraudulent destruction of a will by a party in interest after the death of the testator, see *Mahood v. Mahood*, Irish L. R., 8 Eq., 359; *Podmore v. Whatton*, 3 Sw. & Tr., 449.

What not: *Wharram v. Wharram*, 3 Swabey & Tristram, 301.

The question of the fraudulent destruction of a will under the 67th section of the statute is one of fact, and must be proved by satisfactory evidence: *Timon v. Claffy*, 45 Barb., 438, affirmed 41 N. Y., 619, *sub nom.* *Conroy v. Claffy*.

See *Idley v. Bowen*, 11 Wend., 227.

A party seeking to establish a will as lost or destroyed, may establish it upon satisfactory evidence of its contents: *Idley v. Bowen*, 11 Wend., 227.

The burthen of proof is on a party seeking to establish a lost will by parol evidence of its contents, to prove the contents by evidence, strong, positive and free from doubt: *Newell v. Homer*, 120 Mass., 277; *Matter of Johnson's Will*, 40 Conn., 587.

On a bill to establish a lost will, proof must be made of its execution and validity, its contents by two witnesses, its existence at the death of the testator, and its loss: *Grant v. Grant*, 1 Sandf. Chy., 235.

To establish by copy a will alleged to have been destroyed or suppressed by parties having an adverse interest thereto, evidence of a conspiracy by such parties to suppress the will is immaterial, unless accompanied with evidence sufficient to justify a jury in finding the execution and contents of the will, and its loss since the testator's death: *Newell v. Homer*, 120 Mass., 277.

As to proof of the contents of a lost will; see *Dan v. Brown*, 4 Cowen, 483; *Matter of Johnson's Will*, 40 Conn., 587; *Podmore v. Whatton*, 3 Sw. & Tr., 449.

The contents of a lost will may be established by the testimony of witnesses who have heard it read, but have not read it themselves: *Morris v. Swaney*, 7 Heisk. (Tenn.), 591.

Testator, in the year 1825, duly made a will in the presence of witnesses. In 1834, shortly before his death, he gave instructions for another will, but died

without completing it, and the instructions were refused probate, as being incomplete. Neither the original, nor any draft copy or note of the will of 1825 was forthcoming. The execution was duly proved, and three persons swore that they saw and read the original will after the testator's death, and deposed from memory to the contents of that will, which contained limitations of freehold estate, as well as bequests of personal property; and one of them admitted that she had destroyed it for a particular purpose. The evidence of these witnesses being consistent, and corroborated by circumstances, though they differed in their accounts of the contents, the court decreed for the contents, as given by the depositions most worthy of credit. An ejectment was afterwards brought, and the jury found for the devisee: *Marland v. Objilsay*, Milward (Irish), 405.

The deposition of one subscribing witness to the execution and contents of a lost will, corroborated by evidence of subsequent recognition of the will by the testator, is sufficient proof of the *factum*. A party setting up a will is not bound to produce the second subscribing witness, unless ordered by the court to do so. A person who had had a will, and admitted that he had lost it, was indicted for cancelling it, and a verdict of guilty was obtained; but judgment not having been obtained, the record was held not to be evidence of a conviction. The general principle is, that a criminal conviction cannot be admitted as proof of a fact in a civil suit. The loss or destruction of the will not being alleged or proved, the court refused to give probate to its contents: *Jameson v. Leitch*, Milward (Irish), 683.

Though in a suit to establish a will as a lost will the statute requires the evidence of two witnesses, or a copy of the alleged will as equivalent to one of them, the rule does not apply to a case where one of the parties is attempting to make title through such lost will: *Harris v. Harris*, 26 N. Y., 433, reversing 36 Barb., 88, 574.

See also *Timon v. Claffy*, 45 Barb., 444-5, 41 N. Y., 619, *sub nom.* *Conroy v. Claffy*.

That portion of section 3 of 1 Rev. Stat., 749, which provides that where a will or codicil containing a devise

shall have been cancelled by the heirs of the testator, or some one of them, the limitation contained in that section shall not commence till after the expiration of one year from the time when such will or codicil shall have been delivered to the devisee, or his representatives, or to the proper surrogate, applies only to cases of concealment which leave the devisees in ignorance of the will and of their rights under it, and not to cases in which the will has come to the knowledge and possession of the devisees, or of those representing them, and is afterwards stolen or taken from them surreptitiously and secreted or destroyed: *Cole v. Gourlay*, 9 Hun, 493.

When a will revoking a former will is in existence, it must be established in the probate court; but when it has been lost or destroyed, and its contents cannot be sufficiently proved to admit it to probate, it may nevertheless be availed of as a revocation, in opposition to the probate of the will revoked by it: *Wallis v. Wallis*, 114 Mass., 510.

Evidence of the relative situation, in point of property, of the children of a testator, is inadmissible in support of the presumption of a revocation of a will, where there is no change of the circumstances of the children between the making of the will and the time of the alleged revocation: *Betts v. Jackson*, 6 Wend., 173.

As to the admission of the declarations of the testator:—

1. On the question of revocation: *Waterman v. Whitney*, 11 N. Y., 157; *Betts v. Jackson*, 6 Wend., 173; see *S. C. below*, 6 Cowen, 877; *Grant v. Grant*, 1 Sandf. Chy., 235; *Sherry v. Lozier*, 1 Redf. Surr. R., 454; *Matter of Johnson's Will*, 40 Conn., 587.

2. On the question of fraud, duress, imposition, etc.: *Waterman v. Whitney*, 11 N. Y., 157; *Nelson v. McGiffert*, 8 Barb. Chy., 158; *Dennis v. Weekes*, 51 Geo., 24.

3. On the question of competency of the testator: *Waterman v. Whitney*, 11 N. Y., 157; *Dennis v. Weekes*, 51 Geo., 24.

4. On the question of destruction of a will by the testator: *Betts v. Brown*, 6 Wend., 173; *Matter of Johnson's Will*, 40 Conn., 587; *Lawyer v. Smith*, 8 Mich., 411; *Knapp v. Knapp*, 10 N. Y., 276; *Jackson v. Betts*, 6 Cow., 377; *Grant v. Grant*, 1 Sandf. Chy., 235.

5. As to the effect of admissions or declarations by parties to the litigation, claiming under or against the will: *Horn v. Pullman*, 10 Hun, 471; *Dan v. Brown*, 4 Cowen, 483; *Grant v. Grant*, 1 Sandf. Chy., 235; *Julke v. Adam*, 1 Redf. Surr. Rep., 454; *Outley v. Outley*, Milward (Irish) Rep., 193.

By statute, in New York, it is provided (2 R. S., 64, § 42, 2 Edm. St. 64, 3 R. S., 6th ed., 63, § 40):

"§ 42. No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses."

For a review of many authorities as to what is and what not a valid revocation, see *Matter of Pinckney's Will*, 1 Tucker's Surr. R., 452-460; *Matter of White's Will*, 25 N. J. Eq., 501.

Mere parol declarations of a deviser will not amount to a revocation of a will affecting lands: *Dan v. Brown*, 4 Cowen, 483; *Jackson v. Potter*, 9 Johns., 812; *Hargraves v. Redd*, 43 Ga., 143; *Meredith v. Maunsell*, Milward (Irish) R., 132.

Parol evidence is inadmissible to show, of itself, the revocation of a will; such evidence can only be introduced to explain and show the intention of equivocal acts, by the testator, or by his direction, destroying or abrogating his will: *Hargraves v. Redd*, 43 Geo., 142.

The statute disposes of the whole doctrine of implied revocations. No expressed intention or wish to revoke a will is effectual, either in itself or as auxiliary to other circumstances, unless authenticated in the mode prescribed by the statute for the making and revocation of wills: *Delafield v. Parish*, 25 N. Y., 9.

After administration granted, four unattested wills, three others apparently duly executed, and several papers of revocation were discovered. The last of the executed wills was proved, and it was held that it was not revoked by any of the other instruments, which were only subscribed by the testator, but not attested by subscribing witnesses. A revocation, to be valid, must be executed with all the formalities requisite for the due execution of a will. This will is not affected by any written evidence of an intention to revoke, no matter how clearly proved or frequently expressed: *Nelson v. Public Admr.*, 2 Bradf. Surr. R., 210.

The testator having desired to make a codicil to his will, in order to enlarge the provisions in favor of his daughter, and his son, who took the chief share under the will, and who had the custody of that instrument, having refused to produce the will at the request of the testator, for the purpose of alteration: Held, that the will was not thereby rendered invalid.

The prevention of the execution of a codicil by improper means cannot operate to invalidate the will. A will can be revoked only in the manner and form prescribed by the Revised Statutes: *Leocroft v. Simmons*, 3 Bradf. Surr. R., 35.

Testator repeatedly expressed his intention to revoke his will, and called for writing material to do so, but which were refused him, by reason of which he was prevented drawing a revocation. The prevention not having originated in fraud, or in an intention to serve the legatees, the court held that, under the statute of frauds, the declarations of the testator, by words spoken merely, did not work a revocation of the will. The principles of equity applicable to such a case considered and discussed: *Meredith v. Maunsell*, Milward (Irish), 132.

A will can be cancelled in no other way than by its being burned, torn, or obliterated by the testator himself, or in his presence and by his direction and consent, or by a revocation in writing, executed in the same manner as wills are required to be executed.

A testator asked his wife if she had brought his will from its place of deposit according to his instructions, and at the same time informed her that he

wished to burn it up. The wife replied that she had burnt it up:

Held, that this did not amount to a revocation, the will not having been burnt: *Mundy v. Mundy*, 15 New Jersey Eq., 290.

An instrument in the following words, "I do hereby will all I have to my beloved wife Jane, for her to have and hold forever," executed and attested according to the act of 1833, is sufficient to pass the entire real and personal estate of the testator, to the devisee.

The execution of a deed subsequent to the date of the will, by which the testator conveyed a portion of his real and personal estate, to a trustee for the use of his wife, would not operate as a revocation of the will.

Evidence, that a testator who had given his will into the possession of his wife, had afterwards frequently made ineffectual searches for it, with a view of destroying it, and that the wife, the sole devisee therein, brought forward a paper alleging it to be his will, and in his presence burnt it, which he immediately declared to be right, will not amount to a revocation of the will.

To make a cancellation, burning, or obliteration of a will efficacious as a revocation, it must be done by the *express direction* of the testator, and his subsequent ratification would not be equivalent to a previous command.

Whether a will duly executed, and which the testator was prevented from revoking by the fraud of a devisee, could be regarded as revoked, so far as the party to the fraud was concerned, *dubitat*. Per Knox, J.

A will executed under all the solemnities and formalities required by the statute, cannot be set aside by the declarations of the devisee, testified to by persons interested in the destruction of the will: *Clingam v. Mitcheltree*, 31 Penn. St. R., 25.

The testator, after he had duly executed his will, made, in his own handwriting, various alterations. Some legacies he erased, and some he directed to go to other persons. He also changed one of the executors:

Held, that the will, as originally executed, should be upheld.

A testator cannot, by obliterations, partially revoke a will duly executed:

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Sugden v. Lord St. Leonards.

Quinn v. Quinn, 1 Thompson & Cooke, 437.

A testator, after duly executing his will, passed a pen through portions of a devise to his daughter, giving in a note at the foot of the page, bad treatment as a reason: Held, that there may be a partial revocation of a will by obliteration. In respect to revocations, it has become a settled rule, not to give effect to a part of the testator's intention, when effect cannot be given to the whole of it; and where, in connection with an attempt to revoke devises to his daughter, the testator designed to give the same property over to his two sons, by altering the residuary clause, striking out the words "my children," and inserting "my two sons," the insertion being inoperative for want of re-execution and attestation, and the intent failing as to the substitution intended: Held, that the devises to the daughter were not revoked, and that the will should be admitted to probate as it originally stood: *McPherson v. Clark*, 3 Bradf. Rep., 92.

After the death of a testator his will, dated in 1844, was found with his original signature erased, but another signature by him appeared a short distance beneath:

Held, on the facts and circumstances deposed to, that the original signature was not erased *animo revocandi*, as required by the Wills Act, and that in the probate the original signature must be restored, and the second signature omitted: *Matter of King's Will*, 2 Robertson's Ecc. Rep., 408.

A testator executed his will in 1843, which remained in his custody until his death, when it was found in a mutilated state, torn and cut; but the signatures of the testator and of the attesting witnesses remained at the end of the will:

Held, in the absence of extrinsic evidence, from the peculiar manner in which the mutilations were effected, that there was no intention to *revoke* the whole will, but that the papers as altered were intended for a draft of a new will, and, in the event of his not making a new will, to operate as his will. The testator died suddenly: *Clarke v. Scripps*, 2 Rob. Ecc. Rep., 563.

See also *Lawyer v. Smith*, 8 Mich., 411.

A testator executed a will in 1864 revoking all former wills. In 1865 he destroyed this will with an intention, expressed at the time, that he wished to substitute for it a will of 1863, which he held in his hand.

The court, overruling a dictum in *Dickinson v. Swatman* (30 L. J., P. M. & A., 84), held, that the act of destruction by the testator was referable solely to his intention to validate the will of 1862, and that act being conditional, and the condition being unfulfilled, there was no revocation: *Powell v. Powell*, L. R., 1 Prob. and Mat., 209.

The mere act of tearing, burning, cancelling, obliterating, or destroying the instrument, is not sufficient to operate as a revocation. It must be done *animo revocandi*: *Sweet v. Sweet*, 1 Redf. Surr. Rep., 454; *Jackson v. Holloway*, 7 Johns., 394; *Dan v. Brown*, 4 Cowen, 483.

In the case of a will and codicil, where the concluding words of the codicil, and the name of the testator attached thereto, are torn off, the name and seal to the will remaining entire: Held, that the codicil was cancelled by the act of tearing; and that it lay upon the party who wished to establish it to show that the cancellation was done by accident or mistake, or without an intention to revoke.

In such case the legal presumption is that the tearing was done by the testator himself when he was of sound mind.

In tearing the name from the codicil a part of the will written on the opposite side of the sheet was also torn; and the jury were instructed that if by mistake, intending only to cancel the codicil, the testator tore off a part of the will, forgetting there was writing on the other side, the will would not thereby be cancelled: Held, that the jury might have been instructed as matter of law that there was no cancellation of the will: *Cook's Will*, 3 Penn. L. J., 353, 5 Penn. L. J. R., 1.

The defendant's ancestor and deviser gave a bond in a penal sum conditioned to pay, after Mary Territt's death, £1,000 to such person or persons as she should by deed or will appoint: Held, 1st, that such an alternative power to appoint a sum of money (not necessarily working a transmutation of property like an appointment of land), was meant to be ambulatory during the life of the

person who was to make the appointment; and therefore that an execution of it by deed (which in fact was retained in her own possession) might be revoked by cancellation *animo cancelandi*, though it contained no power of revocation.

But 2dly. That as the mere act of cutting off her name and seal from the deed was equivocal, it might be explained, and its effect done away, by showing, from what was said by her at the time, that she did it under a mistaken notion that she had provided an effectual appointment by her will made after the deed, and that the deed was therefore useless; whereas, in truth, her will could not operate as an appointment, as it contained no direction for raising the money upon the obligor's estate, but proceeded upon the supposition, as therein expressed, that the children of her appointee (who was dead at the time of the will made) "would acquire the said £1,000, *under and by virtue of the deed of appointment*," and giving all the rest and residue of her estates and effects to them and others, "on the express condition that they (the children) should bring into hotchpot with such residue, &c., the said £1,000." And whether she mistook the *contents* of her will at the time she cut off her name and seal, and made the declaration before mentioned (which would be a mistake *in fact*); or whether she mistook the *legal operation* of her will (which would be a mistake *in law*); in either case the mistake annulled the cancellation: *Perrott v. Perrott*, 14 East, 423.

A party seeking to establish such will may repel the presumption that it was destroyed by the testator *animo revocandi*, and show that it was improperly destroyed: *Idle v. Brown*, 11 Wend., 227.

The destruction of a will by the testator is not a revocation thereof, unless he intends thereby to revoke it: *Smith v. Wait*, 4 Barb., 28.

And a lunatic can have no such intent: *Smith v. Wait*, 4 Barb., 28; *Nelson v. McGiffert*, 3 Barb. Chy., 153; *Matter of Freeman's Will*, 54 Barb., 274, affirming 1 Tucker's Surr. R., 205.

As to species of insanity and effect: *Matter of Freeman's Will*, 54 Barb., 274.

If a man is incompetent to make a valid will, he is equally incompetent to revoke a will made previously: *Smith v. Wait*, 4 Barb., 28.

But see *Deiafield v. Parish*, 25 N. Y., 9, as to whether the testator is required to possess as much capacity to be entitled to revoke as to make a will.

The complete destruction or cancellation of a will, is not necessary to constitute its revocation. A destruction of it, as complete as was in the testator's power in his infirm health, is sufficient: the testator being of a sound mind, and the act being *animo revocandi*. The testator tore his will into several fragments, which were carefully collected by his wife, and sewed together in such a manner that the instrument was perfectly legible when propounded for probate. The testator was of sound mind, though in infirm health, at the time of the tearing, and expressed satisfaction at its destruction: Held, that there was a valid revocation of the will: *Sweet v. Sweet*, 1 Redf. Surr. Rep., 451; *Dan v. Brown*, 4 Cowen, 483; *Matter of White's Will*, 25 N. J. Eq., 501.

In *Bibb v. Thomas* (2 Wm. Blackstone's Rep., 1043), it was held that a slight tearing of a will, and throwing it on the fire, with a deliberate intention to consume it, by the testator, though it falls off and is preserved by a by-stander, without his consent or knowledge, is a sufficient revocation. The court (p. 1044-5) said: "This is a sufficient revocation. A revocation under the statute may be effected either by framing a new will amounting to a revocation of the first, or by some act done to the instrument or will itself, viz., burning, tearing, cancelling, or obliteration by the testator, or in his presence, and by his directions and consent. But these must be done *animo revocandi*: Onyons & Tryers, *Hide & Hide*, 1 Eq. Cas. Abr., 408, 9. Each must accompany the other; revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The statute has specified four of these; and if these or any of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. It is not necessary that the will, or instrument itself, be

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totally destroyed or consumed, burnt or torn to pieces. The present case falls within two of the specific acts described by the statute. It is both a burning and a tearing. Throwing it on the fire with an intent to burn, though it is only very lightly singed and falls off, is sufficient within the statute."

Where one had executed his will, as a sealed instrument, and tore off the seal *animo revocandi*, it was held a sufficient revocation, notwithstanding the statute did not require a seal: *Price v. Powell*, 8 Hurl. & Norm., 341; 1 Redf. on Wills (2d ed.), 314, ch. 7, § 20; *Matter of White's Will*, 25 N. J. Eq., 501.

It is held in America, also, that tearing off the seal, although not an indispensable part of a will, will amount to a revocation: 1 Redf. on Wills (2d ed.), 315, note 36, citing *Avery v. Ptxley*, 4 Mass., 480; *White's Will*, 25 N. Jer. Eq., 501.

After the death of the testatrix, a will twenty-five years old was discovered in a barrel among waste papers, and either torn or worn into several pieces, which were scattered loose among the papers in the barrel. Whether the injury to the instrument was done by the testatrix or by some other person, and if by her, whether accidentally or intentionally, and for

the purpose of revoking the will, are questions of fact for the jury; and to aid them in determining these questions, and not as separate and independent evidence of revocation, the declarations of the testatrix, made after the date of the will, that she had destroyed it, are competent evidence: *Lawyer v. Smith*, 8 Mich., 412.

The Revised Statutes permit the revocation of a will by its "destruction" by the testator, and do not require proof of the mode of destruction when the instrument was last in the testator's possession and cannot be found.

Proof of the injury or destruction of the will by two witnesses, is required when the act has been performed by some other person, in the testator's presence, and by his direction and consent: *Bulkley v. Redmond*, 2 Bradford, 281.

It seems that a duplicate will in the hands of a third person is revoked by the revocation of the one in possession of the testator: *Betts v. Jackson*, 6 Wend., 173.

Where a will, which revokes a former will, is destroyed by the testator *animo revocandi*, the former will, though remaining in existence uncanceled, is not thereby (under the statute) revived: *Rudisill v. Rodes*, 1 Virginia Law Jour., 617.

[1 Probate Division, 253.]

May 18, 1876.

[IN THE COURT OF APPEAL.]

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Necessaries—3 & 4 Vict. c. 65, s. 6—*Money advanced for Disbursements of foreign Ship in British Colonial Port*—*Personal Credit*—*Practice*.

The master of a foreign vessel lying in the port of Quebec, being without funds or credit, by means of a bill of exchange drawn upon a firm of shipbrokers in London, procured the advance of a sum of money for necessaries for the ship. The bill of exchange was accepted and paid, but the acceptors, not having received the amount of the bill from the shipowners, instituted an action against the ship for the amount of the bill:

Held, that the court had jurisdiction to entertain the action.

The Wataga (Sw. Adm. 165) and *The Onni* (Lush. Adm. 154) followed.

THIS was a cause of necessaries brought by Lloyd, Lowe & Co., shipbrokers of London, against the Norwegian vessel Anna. The owners of the vessel appeared as defendants, and the following statement of claim was delivered:—

1. The said bark is a Norwegian vessel belonging to the defendants, and arrived in the port of Liverpool in the month of December, 1875.

2. The plaintiffs are shipbrokers carrying on business in copartnership in London.

3. About the end of October, or beginning of November, 1875, the said vessel was lying at the port of Quebec bound for some safe port on the west coast of Great Britain.

4. The master of the said ship was, at Quebec aforesaid, then and there obliged to make certain necessary disbursements to the extent of £293 8s. 2d. for and on account of and for the supply of necessaries thereto, and, being himself without funds and without credit, procured the said sum of £293 8s. 2d. for the said necessaries by means of a bill of exchange for the said amount then and there drawn by him upon the plaintiffs, and the said master thereupon advised the plaintiffs of the same by a letter, which was in the words and figures following:—

“Quebec, 6th November, 1875.

“Messrs. Lloyd, Lowe & Co., London.

“Dear Sirs,—I have this day taken the liberty to value on you, at thirty days sight, for £293 8s. 2d. sterling, two hundred and ninety-three pounds eight shillings and two pence, in favor of Mr. Francis Gunn, of Quebec, being for the necessary disbursements of my vessel, the bark Anna, of Christiana, which I hope you will duly honor on presentation, and please charge to account of said vessel and owners, P. Hernandsen, Esq., of Christiana.

“Your obedient servant,

“H. W. HANSEN,

“Master of bark Anna.

“P.S.—The above amount is duly insured from Quebec. Policy inclosed.”

*5. The plaintiffs duly accepted and paid the said [254 bill of exchange at maturity.

6. The said bill of exchange was accepted and paid by the plaintiffs as aforesaid in the necessary service of the said vessel as aforesaid, and upon the credit of the said vessel, and not on the personal credit of the said master, and the said sum of £293 8s. 2d. still remains wholly due and owing to the plaintiffs.

The defendants demurred to the statement of claim upon the grounds that a foreign ship could not in this court be made answerable for a claim in respect of necessaries supplied in a foreign port, and that the plaintiffs were, under the circumstances stated in the statement of claim, in no better position than the persons who supplied or advanced the alleged necessaries at Quebec aforesaid.

March 7. *Myburgh*, in support of the demurrer: If the

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decision of Dr. Lushington in the case of *The Wataga* ('), that necessities supplied to a foreign ship in a colonial port are within the purview of the 6th section of the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), is to be considered as unshaken, it must be admitted that this court is bound to follow it. It must, however, be remembered that possibly the judgment in that case could be supported on the ground that the ship was on the high seas at the time when the necessities were supplied. The wider construction there put on the statute is scarcely consistent with the grounds of the previous decision of the same learned judge in the case of *The Ocean* ('), or with the language of the judgment subsequently delivered by him in the case of *The India* ('), where it was held that the statute did not extend to give the Court of Admiralty jurisdiction to entertain claims for necessities supplied to a foreign ship in a foreign port. In the present case the Anna was not on the high seas at the time when the necessities were supplied, but clearly within colonial jurisdiction, as she was lying in the river at Quebec, and it can hardly be denied that the language of the court in the case of *The India* (') would apply equally to all cases where necessities have been supplied to a foreign ship elsewhere than on the high seas or in England or Wales. According to the general practice where statutes are intended to apply to 255] the colonies, *the colonies are expressly mentioned, but in this statute there is nothing to lead to the inference that the Legislature intended to give a power to this court to proceed *in rem* in cases where necessities have been supplied in colonial ports. If, however, the court is of opinion that the case of *The Wataga* (') is binding on it until reversed by superior authority, there are two other grounds on which the defendants contend that the demurrer ought to be allowed.

[SIR ROBERT PHILLIMORE: No points for argument have been delivered. I think it very desirable that the practice of the court should be assimilated to the practice of the common law divisions in this respect, and that in all cases to be argued on demurrer the points to be relied upon in argument should be delivered.]

The second point taken by the defendants is that the statement of claim does not allege that at the time when the money advanced to the master of the Anna was expended in necessities the master of the Anna was without credit.

Thirdly, it appears by the letter set out in the statement of claim that the money advanced was advanced against a

(') Sw. Adm., 165.

(') 2 W. Rob., 568.

(') 32 L. J. (P. M. & A.), 185.

bill of exchange, which was accepted by the plaintiffs on the personal credit of the owners. In these circumstances there is no claim against the ship, as the plaintiffs have elected to look for payment to the owners, and not to the ship, and the allegation to the contrary in the sixth article of the statement of claim is inconsistent with the rest of the case.

E. C. Clarkson, on behalf of the plaintiffs: With regard to the question of jurisdiction, the decision in the case of *The Wataga* (*)—a decision acquiesced in since 1856—is conclusive; moreover, the state of the law, as settled by that decision, was known at the time of the passing of the Admiralty Court Act, 1861 (24 Vict. c. 10), yet in that act is to be found no enactment with regard to necessities supplied to foreign ships in colonial ports.

[SIR ROBERT PHILLIMORE referred to the case of *The Ella A. Clark* (*).]

As to the remaining arguments of the defendants, even if it *were not competent to the plaintiffs to show by [256 the evidence of surrounding circumstances that the advance was made on the credit of the ship, it must be presumed that she is liable, inasmuch as the necessities were supplied for her use: *The Perla* (*). In truth, however, the 6th section of 3 & 4 Vict. c. 65, conferred on the Court of Admiralty jurisdiction over claims for necessities supplied to foreign ships, quite irrespective of the question whether the necessities were or were not furnished on the personal credit of the shipowner.

[SIR ROBERT PHILLIMORE referred to *The Onni* (*).]

Myburgh, in reply, referred to *The Two Ellens* (*), and submitted that the case of *The Onni* (*) had no application, as in the present case it was clear that the plaintiffs had accepted the bill of exchange on the express terms, as was shown by the letter set out in the statement of claim, that there should be no lien on the ship, but that the amount of the bill should be settled in account with them personally.

SIR ROBERT PHILLIMORE: This discussion relates to a demurrer to a statement of claim. The Norwegian vessel *Anna* arrived in the port of Liverpool in the month of December, 1875, and her master, finding himself without funds, carried on board goods to the amount of £293 8s. 2d., for the purpose of supplying necessities to the vessel, and borrowed the money by means of a bill of exchange, of which the master advised his owners in these words: [His Lord-

(*) Sw. Adm., 165.

(*) Br. & L. Adm., 32; 32 L. J. (P. M. & A.), 211.

(*) Sw. Adm., 353.

(*) Lush. Adm., 154.

(*) Law Rep., 4 P. C., 161.

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ship here read the letter set out in the statement of claim.] Now three points have been made in support of the demurrer, and it will be convenient to take the first point last, because it is the one of greatest importance. The first of the two latter points is that it appears upon the statement of claim that the money, which had been raised by the bill of exchange to be expended in necessities, was obtained on the captain's personal credit. I am of opinion that that point is untenable. The third point is that the bill of exchange was accepted by the plaintiffs for the owners of the vessel. That depends on the construction, in some measure, of the letter I have read. It is said that there is no claim 257] upon *the ship, and that the master of the vessel supplied the necessities, and has to look only to the owners. Now, in the first place, it is distinctly pleaded in the sixth article of the statement of claim that: [Here his Lordship read the 6th article of the statement of claim.] It is contended that the letter I have read cannot receive any construction from the statement contained in this 6th article. I am by no means certain that it would not be proper in this case, in order to understand the letter to which I have referred, to take into consideration the surrounding circumstances, and the question then would have to be determined after evidence of those surrounding circumstances. But I do not think it necessary to place the overruling of the demurrer upon that ground. I consider the question that was decided by my learned predecessor in the case of *The Onni*(¹), is substantially the same as the point raised here to-day. In that case he said: "... I must now consider my jurisdiction entirely governed by the 3 & 4 Vict. c. 65, s. 6. That section merely says that the court shall be authorized to decide all cases for necessities supplied to any foreign ship or sea-going vessel, and, to enforce payment thereof. It makes no distinction whether the necessities were furnished on personal credit or not. I have held that the advance of money for the procuring of necessities is within the equitable construction of the statute. Can the present case be considered as a case of that kind? I can only judge by the information afforded me, and according to that affidavit the master obtains the money to procure necessities by means of this bill, and the money so procured was duly expended for the benefit of the ship. I think in these circumstances I am justified in allowing this claim." In the present case the money was obtained by means of the bill of exchange to provide necessities for the benefit of the ship.

(¹) Lush. Adm., 154.

I am unable to find any substantial distinction on the matter between the two cases. I consider the case of *The Onni* (¹), therefore, is a precedent for the court in the present case.

I have only to advert to the first point raised in the discussion to which I referred, namely, the question as to whether the court has any jurisdiction in the circumstances of this case: the circumstances of this case being briefly that a Norwegian vessel *has obtained necessaries when [258 lying in the port of Quebec, and the plaintiffs, the ship's brokers, bring this suit under the 6th section of 3 & 4 Vict. c. 65. Now it was very properly admitted by Mr. Myburgh in the course of his argument that this point as to the question of jurisdiction was in reality, so far as necessaries are concerned, decided by Dr. Lushington in the case of *The Wataga* (²). It is not necessary to read the whole of that case, but that learned judge considered fully the effect of the statute, and came to a distinct conclusion. There an American ship had been supplied with necessaries, and had been arrested. The judgment was given in 1856, and, as far as I know, it has never till now been questioned. I think also that it has received confirmation from the subsequent statute, 24 Vict. c. 10, s. 5. It appears to me that the argument which has been addressed to me by Mr. Clarkson upon that point is a sound argument, but in any case I should not think it right, if I entertained an opinion, which I by no means express, that Dr. Lushington had erred in his judgment, and had not taken the right view, to take upon myself to reverse his judgment, which I understand he had long considered; and I shall leave the parties to resort, if aggrieved by my adhering to his decision, to the Court of Appeal. I am therefore of opinion that I ought to overrule the demurrer, and I so do. I give leave to the defendants to appeal.

The defendants appealed.

May 18. *Myburgh* (with him *Milward*, Q.C.), for the defendants: The question is whether 3 & 4 Vict. c. 65, s. 6, applies to necessaries supplied to a foreign ship in a colonial port. At the time when that act was passed, the Court of Admiralty had been held to have no jurisdiction in the case of necessaries supplied to a ship in England whether English or foreign, and this was intended merely to alter that state of the law, as appears from the words, "within the body of a county or upon the high seas." But it was never intended to apply to ships in any part of the world. This was decided

(¹) Lush. Adm., 154.

(²) Sw. Adm., 165.

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259] by Dr. Lushington in *The *Ocean* (¹), though he afterwards made a contrary decision in the case of *The Wataga* (²), which no doubt is against the defendants, and is, as they contend, bad law. The ship must be either in the body of a county or on the high seas, and there is nothing in the act to show that its operation was to extend to foreign ports or to the colonies. In the case of *The India* (³) it was decided that the statute did not apply to necessities supplied in a foreign port, and where is the difference? *The Ella A. Clark* (⁴) is again in favor of the defendants.

[JAMES, L.J.: Foreign owners would be much injured if the defendants were to succeed. The masters of their ships could not then in cases of emergency be able to raise money for their wants.]

The facility given to masters is, in fact, a disadvantage to shipowners. The act 24 Vict. c. 10, ss. 4 and 5, does not affect this case.

E. C. Clarkson, for the plaintiff, was not called upon.

JAMES, L.J.: This case really does not require a formal judgment. Dr. Lushington, twenty years ago, in a very elaborate judgment, decided upon the construction of the statute, and that judgment has been acted upon ever since. The Legislature has since that time continually dealt with the matter, and if there had been any notion that the decision was wrong they would have made an alteration accordingly. We have no hesitation in coming to the same decision to which Dr. Lushington came twenty years ago. It is too late to raise questions of jurisdiction after that lapse of time.

Upon the other points it is perfectly clear what the decision should be.

BAGGALLAY, J.A., and LUSH, J., concurred.

Appeal dismissed with costs.

Solicitors for plaintiffs: *H. W. Collins & Robinson*, Liverpool.

Solicitors for defendants: *Gregory, Rowcliffe & Co.*, for Hull, Stone & Fletcher, Liverpool.

(¹) 2 W. Rob., 368.

(²) Sw. Adm., 165.

(³) 32 L. J. (P. M. & A.), 185.

(⁴) Br. & L. Adm., 32; 32 L. J. (P. M. & A.), 211.

[1 Probate Division, 260.]

May 4, 1876.

[IN THE COURT OF APPEAL.]

*THE CARGO *ex* WOOSUNG. (8865.) [260]

Salvage—Agreement—Queen's Ship—Indian Government—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 484.

The commander and crew of a Queen's ship have the same rights to remuneration for salvage as the master and crew of a merchant ship, but

Quære, whether they can make with the captain of the wrecked ship an agreement as to the amount.

The commander of a Queen's ship, sent to render help to a wrecked ship, cannot impose terms and refuse to give salvage services unless those terms are accepted.

A ship belonging to the Bombay Government with a hired commander and crew is, with respect to the provisions of the Merchant Shipping Act, 1854, s. 484, in the same position as a Queen's ship with commissioned officers.

THE Woosung, a steamer of 1,623 tons register, was on her voyage from Calcutta to London with a cargo of indigo, silk, shellac, &c., of the value of about £500,000. In the night of the 20th of February, 1874, she struck on a reef off the island Kotama, in the Red Sea. The passengers and crew were next morning landed on the island, and a boat was sent to a Turkish town some twenty-five miles off, the governor of which came down, accompanied by a Greek captain or merchant. With this Greek, who was able to engage Arab men and boats, Captain Carlin, the master of the steamer, made an agreement for saving and landing the cargo, the Greek receiving one-third of the proceeds of the salvage. A boat sent from the Woosung, afterwards intercepted a passing steamer, and by this means news of the wreck was telegraphed to London. The Salvage Association in London, acting as agents for the owners of the cargo, thereupon applied to the Under-secretary of State for India to have one of the Queen's ships sent to the wreck in order to protect and save the cargo, undertaking to pay for the coal consumed and to make a present to the officers and crew. The under-secretary accordingly telegraphed to Aden, and, in obedience to his instructions, the political resident at Aden sent off to the wreck a steamer called the Kwangtung, belonging to the Bombay Government; the commander, Captain Elton, and the officers, being uncovenanted civil servants of the Bombay Government *holding no commission under the Queen, and ap- [261] parently liable to be dismissed with a month's pay, and

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not entitled to any pension. The directions given by the resident to Captain Elton, were contained in the following letter:

“Sir,—I have the honor to annex for your information a note respecting the wreck of the S. S. Woosung on the island of Kotama, and to request you will proceed to the spot at full speed after landing the relief detachment at Perim. You will notice the Woosung is said to be holed in several places, and to be full of water. If practicable, your stay at Kotama for salvage services should not exceed forty-eight hours, as your early return to Perim is desirable to convey to Aden the released detachment of the 2d Grenadiers, and other details. The Kwangtung can return to Kotama, if it should be considered advisable on the receipt of your report, but from the condition of the ship it seems doubtful whether much cargo can be saved.”

The Kwangtung reached the wreck on the 6th of March, and, as was alleged on her behalf, found the Arabs plundering, and that it was not likely she would be able to save the cargo. The captain of the Woosung requested the captain of the Kwangtung to undertake the salvage on the same terms as those which the Greek had accepted. The captain of the Kwangtung declined, and, after much bargaining, the following agreement was, on the 9th of March, made and signed:

“It is this day mutually agreed between Captain Carlin of the Woosung and Captain Elton of the Kwangtung, i.e., the latter agrees to save as much as possible of the cargo, gear, tackling, and fittings belonging to the above-named vessel, including everything on deck or below that he possibly can, and consign the same to Messrs. Luke, Thomas and Company, at Aden, to be retained in their custody until further advices. After the sale of which, and after all expenses have been paid thereon, Captain Carlin on his part agrees to pay to Captain Elton or his agents one half of the proceeds of the same. In this agreement Captain Elton finds all necessary men, gear, and appurtenances for the discharging, unrigging, shipping, and unshipping, also for landing at Aden; and Captain Carlin hold himself irresponsible for any *accident or damage that may accrue to the Kwangtung, either alongside the Woosung or otherwise.”

The captain and crew of the Kwangtung, working under great heat and in putrid stench, raised and saved a considerable portion of the cargo, which ultimately realized on

sale about £37,000. The Greek was paid by the owners of the cargo a sum of £16,000 for cargo saved, and for abandoning all claim and interest in the cargo remaining. The agent of the Salvage Association on the 27th of March came down, and took charge of the wreck, and refused to permit the captain and crew of the Kwangtung to continue the salvage on the terms of the agreement, but offered them £100 a day, which they refused, and left off work. Some further portion of the cargo was saved, but on the 12th of April a gale came on, and the Woosung went to pieces.

The captain, officers, and crew of the Kwangtung, with the consent of the Admiralty, presented their petition in the High Court of Admiralty to recover one-half the value of the property salvaged by them. The consent of the Admiralty was given by the following letter, signed by the secretary to the Admiralty: "Merchant Shipping Act, 1854. Admiralty, 22 July, 1874. I hereby certify that the Lords Commissioners of Admiralty consent to the commanding officer of H.M.S. Kwangtung, of the Bombay marine, prosecuting his claim as he may be advised for salvage in respect of services rendered by such ship under his command to the steamship Woosung." The Salvage Association had previously applied to the Admiralty to refuse this consent, offering to pay the captain any sum which the Under-secretary of State for India might award.

The defendants, by their answer, denied that the services, and danger, and sufferings of the officers and crew of the Kwangtung were so great, and alleged that they had been guilty of misconduct. They also alleged that the agreement was inequitable, and one which the captain of the Woosung had no power to make, and was not binding on the owner of the cargo. Also that the Kwangtung had been sent under an agreement between the Salvage Association and the secretary of state, whose servant Captain Elton was. Also that Captain Elton was an officer in the Queen's service, in command of one of her ships sent on a special service, *and that he had no right to refuse to under- [263 take salvage work except on his own terms. They submitted that Captain Elton, the officers, and crew of the Kwangtung, were entitled to reasonable salvage only.

The cause was heard before Sir Robert Phillimore, judge of the High Court of Admiralty.

Butt, Q.C., *Herschell*, Q.C., and *Edwyn Jones*, for the plaintiffs.

Sir H. James, Q.C., *Cohen*, Q.C., and *Phillimore*, for the defendants.

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• Witnesses were examined before the judge, and the effect of their evidence is stated in the following judgment:

June 25, 1875. SIR ROBERT PHILLIMORE [after stating the facts of the case]. The question debated before the court was as to the validity of the agreement. It was contended that it was void by reason of its exorbitancy, and also on the ground of collusion, but that the evidence did not support.

Now, with regard to agreements of this kind, what the probable amount which the court would award, in the absence of any agreement as to salvage, does not furnish a satisfactory test as to the validity or invalidity of the agreement. The rule of the court was laid down by Dr. Lushington in *The Theodore* (') and in many other cases. In the case of *The Theodore* (') it is concisely stated as follows: "The court is very much indisposed to set aside an honest agreement, but it must be satisfied that the agreement is honest. Where there is any doubt, its rule is to adhere to the agreement; and the court would be just as ready in favor of salvors to set aside an agreement if satisfied that it was wholly inequitable." In the very useful work published on the practice of this court by Mr. Williams and Mr. Bruce, the cases relating to this point of law are very carefully examined, and the result is, in my judgment, very ably stated ('). "It is submitted," the learned authors say, "that the true principle is that the agreement of the parties must bind unless the court is led to the conclusion that it was entered into in ignorance of material facts or induced by fraud. Where the amount is inadequate or exorbitant 264] *that fact can only be regarded by the court as pointing to the probability that there was some unfair dealing at the time of the making of the agreement. This applies with especial force to cases where persons in extremity, in order to obtain assistance, have entered into an agreement to pay an exorbitant sum to the salvors."

Now, the first thing the court has to consider is, who are the parties to this agreement? Are they ignorant people, or is it one ignorant, and the other cunning and trying to overreach the ignorant man? or is it made between persons perfectly capable of understanding what they are about and the conditions into which they were entering? It cannot be doubted that they belonged to the latter category. Captain Carlin of the Woosung, and Captain Elton of the Kwangtung, were surely competent persons so far as that consideration goes.

(') Sw. Adm., 351, 352.

(*) Page 131, n.

The next thing the court has to consider is, whether the agreement was made deliberately. Now the captains have been examined, and there is no reason whatever to doubt the credibility of the evidence given by Captain Carlin. He says, fairly enough, he did not know anything about what the law was as to salvage, and he did not know anything about the law as to Her Majesty's ships in the public service, but that he bargained a long time with Captain Elton to take one-third, and it was only when the bargaining failed that he agreed to give one-half. It was entered into, therefore, very deliberately and by competent persons.

Now the sum was very large, but it is stated that the whole would go to the Secretary of State for India, and that the captain was to receive one-tenth. It seems that there is not much distinction to be drawn between a ship belonging to the Bombay Government and a ship belonging to the Queen, and the captain of the Woosung says that he was not aware that a ship in the Queen's service could not claim for salvage services—that is to say, on the ground of services rendered by the ship. He said, however, that if he had been aware, it would have made no difference whatever in his arrangements. I must, however, observe, without entering into the considerations of how far ignorance of the law could possibly affect this agreement, that it does not appear from the evidence that the ship herself was any agent in the salvage *of the cargo. The service of [265 salvage was essentially rendered by the men who were on board the ship, not, as in most cases in this court, by the agency of the steam power of the vessel. I am of opinion, as I have already expressed, that there was no disability affixed by the law on Captain Elton to render salvage services and to obtain the usual and proper remuneration, whatever that may be, for his services. Coupling with that the permission of the Lords of the Admiralty to the institution of this suit, the result is that the court has to consider the claim of Captain Elton to remuneration for salvage service in this case as it would that of an ordinary merchant captain. The agreement having been entered into by competent persons, and the charge of collusion and misconduct having been withdrawn, does the amount itself warrant the court in coming to the conclusion that this sum is so grossly inadequate or exorbitant as to render it proper that the court should set the agreement aside, having regard to the principles of the law, which I have stated already? Now we must consider a little the facts of the salvage. In this case it was rendered, it is true, in one sense without much personal

danger to the salvors; but that is only in one sense, because the evidence shows, I regret to say, that of those who rendered those salvage services many of them were great sufferers from the worst of all dangers, perhaps, to sailors, the disease and the mischief which was generated by this putrid stench, and by the noxious gases which prevailed at this time. [His Lordship then stated the evidence on this subject, and particularly as to the services of the first officer of the Kwangtung.] The next circumstance I have to observe upon is, that the evidence showed, if it were necessary to establish the point, that the manner in which the Arabs worked was not to be compared in its efficacy or its usefulness to the manner in which the Europeans worked. It is said (and this was, I think, the main argument addressed to me on behalf of the defendants) that this contract is void by reason of duress and compulsion. Now, in one sense the services of every salvor are unwillingly and under duress accepted; the lesser evil of losing a portion of the profit and property being submitted to rather than the greater evil of losing all, so that in that sense all salvage services are accepted under compulsion. But there is no compulsion [266] *or duress of a criminal character, unless, indeed, all reasonable limits are transgressed by the salvors, or there has been a use of false representations or the excitement of ungrounded fears in order to procure the acceptance of their services. But I look in vain for any element of that kind in the present case, and if I compare it with the salvage agreement made with the Greek, and the payments made to others, such as the stewardess and the engineer, I must say that the charge of compulsion upon this and upon other grounds entirely fails. The services lasted more than six days, and were perfectly effectual, but I think it unnecessary to travel further into that question, because I have not to consider, as I wish to be distinctly understood, whether half the proceeds would be the amount which I should award if it was an ordinary salvage service. The question is, having regard to the circumstances I have stated and to the principles of law to which I have adverted, whether this amount of itself presents such features of what is exorbitant and inequitable as to induce the court to do that which it sometimes does very reluctantly, that is to say, interfere with an agreement made between competent parties. I must decline to do so on the present occasion, and I must pronounce for the validity of this agreement.

The defendants appealed.

Sir *H. James*, Q.C., *Cohen*, Q.C., and *Phillimore*, for the defendants: The plaintiffs in this case are in the Queen's service, and can only recover what is sanctioned by the Admiralty. This is provided for by the Merchant Shipping Act, 1854, ss. 484 and 485. No doubt there was an agreement, but salvage agreements have always been held by the Court of Admiralty liable to be reopened: *The Helen and George* ('). This agreement was with the master, and though no doubt he is for many purposes agent of the owners, he is not their agent so as to enter into an inequitable agreement. There might have been hardship and suffering, but there was no danger in the case, and except in very small amounts, and in the case of derelicts, the court has never awarded a half as salvage: *The Inca* ('). The agreement was *one-sided, for the salvors were not forced to go [267 on. The Greek, no doubt, was to have one-third, but then he had to hire boats and Arabs. But further, this agreement was controlled by the agreement made in London, in pursuance of which the Kwangtung was sent to the wreck. She was sent on purpose to give help and had no right to make any bargain at all. Suppose that a ship is ashore in England and the owner sends down a tug to help, can the owner of the tug when she is there refuse to help except on exorbitant terms?

Butt, Q.C., and *Edwyn Jones*, for the plaintiffs: The officers of the Kwangtung are not commissioned officers, and are only engaged by the month, and would get no pensions if injured. No doubt a man-of-war would be bound to render service, but she was not a man-of-war, and her officers and crew were not bound to incur risk and suffering. If they do, they have a right to make terms for so doing. The agreement made in London is too vague and amounts to nothing. The master of a stranded ship has in such cases power to bind his owner, and the power of the Court of Admiralty in setting aside any such agreements is no greater than that of any other court, though it has to deal with such agreements more often than other courts. The principle on which they are set aside is always fraud in some shape. Here not even duress can be alleged, for the Greek was there and had got out a good deal of cargo. His agreement has been acted on, and after all, the difference between them is only that between one-third and one-half. If Captain Elton had agreed for one-third it must have been good, and how can the agreement be declared absolutely

(') Sw..Adm., 368.

(?) Sw. Adm., 370.

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void because it is for one-half? As to the Merchant Shipping Act, we have the sanction of the Admiralty.

JAMES, L.J.: I am of opinion that, having regard to the admitted facts of this case, this agreement cannot stand as a final settlement of the amount to be paid as a remuneration to the captain, officers, and crew of the ship *Kwang-tung*.

The circumstances of the case are very simple. The ship *Woosung* was wrecked on a reef in the Red Sea, and was in a position of imminent peril. The lives of the passengers and crew were saved; but, as far as the ship itself is concerned, she was in *such peril that she never was rescued, but went to pieces; and the cargo was going out of her when she was on the reef in this state of the most imminent peril. The ship being in that position, by means of a passing ship information of the accident was sent to London to certain persons interested in the ship and cargo. Thereupon they applied to the India office, and the result of this was that the India office gave directions to the proper authorities at Aden to send a ship to the rescue of the *Woosung*; the agent of the Salvage Association offering to reimburse the expenditure for coal consumed on board the ship to be sent, and to make presents to her officers and crew. It was contended by Sir Henry James that this amounted to an agreement which precluded any right to salvage afterwards. I do not think that it can be fairly said that it in any degree whatever interfered with what otherwise would be the right of the captain and crew as to the salving of the ship, and so far they remained in the position of salvors. It was settled in the case of the *Dalhousie* (¹), that having regard to the peculiar position of the captain and officers in the Bombay marine, they are to receive such salvage as would be allotted to the officers and crews of merchant vessels in similar circumstances. That being so, the political resident at Aden ordered Captain Elton to go to the ship, and directions were given to him. [His Lordship read the letter.] Then the captain, under those directions, does proceed, and I think it was his duty to render his services—all reasonable services—upon the usual terms, that is to say, on receiving such a salvage reward as would be allotted to the officers and crew of a merchant vessel under similar circumstances. He was there to use his ship in a reasonable manner for the protection of the ship and cargo, but when he got there he made the bargain now before us for the use of the ship, the officers,

(¹) See note at end of case, p. 271.

and men, for the purpose of saving the fittings of the disabled ship, and as much as possible of the cargo, for all which salvage services one sum is to be given, and that is one half of the salvaged property. Now, that is an agreement which upon the face of it cannot stand. If it had been an agreement between the captain of an ordinary merchant ship, beyond all question this salvage remuneration would have included everything—the ship, the officers, and the *crew—being the price given for the whole salvage [269 services. It appears to me that this alone would show it to be utterly impossible that this agreement can stand as fixing the price to be paid for the services rendered by the officers and men alone. It is one entire consideration. We have no means of determining what proportion is to go to the ship, and what to the officers and crew, and therefore we are driven to find some other mode of ascertaining how much the officers and crew are to receive. But independently of that, it seems to me that it would be *pessimi exempli* if a person in the position of Captain Elton, sent out to give assistance, is not to be content with the salvage which could be awarded to him, but could say to the master of a wrecked ship, “If you do not accept my terms, I will go away with my ship, and leave you to your fate, though I have been ordered to come here for the purpose of assisting you.” It would be holding out a very dangerous precedent if any public servant under such circumstances could be allowed to say, “I will not do that which I have been ordered to do unless you will agree to my terms.” And it is clear that except under circumstances of extreme pressure, no one would have agreed to pay half of the proceeds of the cargo. The agreement cannot stand, but the plaintiffs are of course entitled to a fair and indeed a liberal remuneration, the amount of which will have to be considered.

BAGGALLAY, J.A.: I am of the same opinion, and I entirely concur with what has been said by the Lord Justice, that the parties are not bound by what took place in London.

The second question is, however, the most important, whether Captain Elton was at liberty to enter into this agreement. He was acting under orders as in command of a ship which belonged to Her Majesty, and he was ordered to go and protect property in the Red Sea. Without actually deciding the question, I think that it was his duty to render all the service he could, and that it was not competent to him to make this agreement. That view is borne out by the 484th and the following sections of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104). [His Lordship

[1 Probate Division, 272.]

May 1, 1876.

THE MEDINA. (N. 57; N. 235.)

Salvage—Inequitable Agreement—Award for Life Salvage.

An English steamship, bound from Sumatra to Jedda, having on board as passengers 550 pilgrims, was wrecked in the Red Sea. The pilgrims took refuge on a rock where if bad weather had set in they would have been exposed to imminent danger. In answer to signals of distress a steamship belonging to the plaintiffs came up, and her master refused to rescue the pilgrims for a less sum than £4,000, which was the amount of the passage money to be paid to the owners of the wrecked vessel for carrying the pilgrims from Sumatra to Jedda. Ultimately the master of the wrecked vessel signed an agreement to pay £4,000 to the master of the plaintiffs' vessel to take the pilgrims to Jedda, and the pilgrims were taken in the plaintiffs' vessel to Jedda in safety. In an action to enforce the agreement:

Held, that the agreement must be set aside as inequitable, and the court awarded £1,800 as salvage remuneration.

THIS was an action brought by the owners of the steamship Timor against the Singapore Steamship Company in the Exchequer Division of the High Court of Justice, but transferred to this division. No statement of claim was delivered in the action, but the indorsement on the writ was in substance as follows:—

The plaintiffs claim £4,000, due from the defendants under an agreement dated the 1st of October, 1875, between the master of the plaintiffs' ship Timor, for and on behalf of the plaintiffs, and the master of the defendants' ship Medina, for and on behalf of the defendants, for the conveyance of passengers by the plaintiffs' ship Timor from Parkin Rock to Harnish Island, Jedda, with interest at £5 per cent. per annum until payment.

The defendants in their statement of defence alleged in substance as follows:—

1. On the 30th of September, 1875, the Medina, while on a voyage from Singapore to Jedda with a general cargo, and having on board 550 passengers (pilgrims) who had embarked at Padang for Jedda, was wrecked on the Parkin Rock in the Red Sea, and the pilgrims were landed by the Medina's boats on the rocks.

2. The Parkin Rock is a small sharp rock about thirty [273] miles from the main *land, and about 240 miles from Aden, and from two to three days' voyage from Jedda.

3. The Medina's boats were so knocked about in landing

the pilgrims on the rock as to be useless, and the lives of the pilgrims, for whom there was scarcely standing room on the rock, were exposed to danger.

4. About 10 a.m. on the 1st of October, the master of the Medina observed a steamer, which proved to be the Timor, bound on a voyage from Kurrachee to Liverpool, and made signals of distress which were observed by the Timor, and she altered her course and bore down to the rock.

5. When the Timor approached the rock the master of the Medina went on board of her and told the master of the Timor the position of the pilgrims and asked him to render assistance.

6. Thereupon negotiations took place between the master of the Timor and the master of the Medina, the master of the Timor refused to take the pilgrims from the rock to Jedda for less than £4,000, and the master of the Medina, who offered £1,500 and subsequently £2,000 to the master of the Timor for his services, and, after these offers had been refused, proposed to refer the amount to arbitration, which proposal was rejected, was ultimately forced to acquiesce in the demand of the master of the Timor, and to sign the agreement sued on. The Medina was totally lost on the said rock.

7. The said sum of £4,000 was not a reasonable amount for the services to be rendered by the Timor, but was an exorbitantly excessive amount for such services, and the master of the Timor in procuring the master of the Medina to sign the said agreement took undue advantage of the position in which the master of the Medina and the pilgrims were placed; and the defendants further say that the master of the Medina had not any authority to enter into the said agreement on behalf of the defendants, and that the said agreement was extorted and improperly obtained from the master of the Medina and is wholly unjust and inequitable and is not binding upon the defendants.

8. The defendants are ready and willing to pay to the plaintiffs such reasonable amount for their services as the court may think just.

The plaintiffs delivered a reply admitting the first five paragraphs of the statements of defence, but joining issue upon the 6th and 7th paragraphs, except the averments that negotiations took place between the master of the Medina and the master of the Timor, and that the latter refused to take the pilgrims from the rock to Jedda for less than

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£4,000, and submitting that the agreement of the 1st of October, 1875, was a valid and subsisting agreement binding upon the defendants.

The master of the Timor and the master of the Medina were examined orally before examiners of the court. The result of their evidence appears from the judgment. During the examination of the master of the Timor the agreement [274] signed by the *master of the Medina was put in. This agreement was substantially as follows:—

“Agreement made this 1st of Oct., between Captain Brown of the Timor, of London, and Captain Black, of the steamer Medina, belonging to the Singapore Steamship Company, Limited, that the said Captain Brown agrees with Captain Black, of the Medina, to take the whole of his passengers (pilgrims) from off the Parkin Rock and take them to the Port of Jedda, or as near thereto as she can safely get, for the lump sum of £4,000 sterling.”

The *Admiralty Advocate* (Dr. Deane, Q.C.), and *Myburgh*, for the plaintiffs: The services here did not alone consist of rescuing the lives of this large number of pilgrims from imminent danger, but there was in fact a transshipment of the pilgrims, in return for payment of freight, whereby the owners of the Medina were enabled to fulfil the contract they had made for the conveyance of the pilgrims to Jedda. Not only did the master of the Timor take upon himself the risk of entering that port—the most dangerous port in the Red Sea—but if any of the pilgrims had fallen sick on the voyage to Jedda, or for any other reason quarantine had been imposed at Jedda, the master of the Timor would have incurred great expense. Considering the class to which such pilgrims usually belong, the breaking out of sickness among them cannot be regarded as an improbable event. In determining whether the agreement was an inequitable agreement it cannot be material that, as it actually turned out, the weather remained calm during the service and that no delay through quarantine occurred to the Timor at Jedda: *The Enchantress* (¹). The agreement can clearly be supported on the principles recognized in the case of *The Waverley* (²).

Wood Hill (Cohen, Q.C., with him), for the defendants: The agreement must be set aside as exorbitant: *The Theodore* (³). Indeed, when the circumstances of the case are considered, it becomes evident that the demand made by the

(¹) Lush. Adm., 93.

(²) Law Rep., 3 A. & E., 369.

(³) Swa. Adm., 351.

master of the Timor, was scarcely consistent with any fair or just dealing. Moreover, *the Merchant Shipping [275 Act, 1854, 17 & 18 Vict. c. 104, s. 458, enacts that the amount of salvage remuneration to be paid by the owners of a vessel in respect of life salvage, shall be a reasonable amount, but the amount asked here is clearly unreasonable. The services were rendered without difficulty or danger, and the Timor obtained a clean bill of health at Jedda. [He also referred to *The Cargo Ex Woosung* (').]

SIR ROBERT PHILLIMORE: The circumstances of this case are very singular; but it is one in which the court really feels no doubt as to the judgment which it ought to give. It is not necessary that I should go into an examination of the authorities which I recently referred to in the case of *The Cargo Ex Woosung* ('), and which I also referred to in the case of *The Waverley* (*). But I may state the result of them to be this, that it is the practice of this court, partly for the protection of absent owners and partly on the grounds of general policy, to control agreements made by masters when an examination of those agreements shows that they are clearly inequitable. In the present case there were upwards of five hundred pilgrims on a rock which is just six feet above water. Their ship had gone to pieces, and the plaintiffs' vessel, the Timor, came up close without any difficulty or danger at all; because the evidence is that the water was quite deep up to the rock; she came up and her captain, in effect, says, I will not relieve you from this situation, which a few hours of bad weather might convert into one of most imminent danger, indeed into your total destruction. I will not take you away unless you give me £4,000. Now, what is £4,000 with regard to the matter saved, which is human life? On the other hand, however, £4,000 is the whole sum that was to be paid for conveying the pilgrims to Jedda, and in my opinion if the master of the Timor had not taken these pilgrims off the rock in the circumstances stated, and bad weather had come on, and they had lost their lives in consequence, he would hardly have been in a better position than a pirate. Nevertheless, it was certainly a valuable salvage service according to the principles upon which such services have always been *considered in this court, but I am of opinion that [276 £4,000 is a great deal too much, and I shall award £1,800. As to the costs there has been no tender, and I shall leave each party to pay their own costs. If there had been a

(') *Ante*, p. 260.

(*) Law Rep., 3 A. & E., 369.

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sufficient tender, I should have given the defendants their costs. I shall not give costs on either side.

Solicitors for plaintiffs: *Brooks, Jenkins & Co.*

Solicitors for defendants: *Dawes & Sons.*

[1 Probate Division, 276.]

May 16, 1876.

[IN THE COURT OF APPEAL.]

THE CITY OF BROOKLYN. (O. 147.)

Collision—Speed—Ship astern—Light.

In a case of collision a steamer will be held not justified in running at full speed on a dark night and not far from a coast where other vessels are likely to be.

A vessel, unless there be apparent danger, is not guilty of negligence in not showing a light to a vessel following her.

THIS was an action brought by the owners of the Italian bark *I. Mille*, of 376 tons register, against the owners of the Inman steamer *City of Brooklyn*, 1,978 tons register, for damage done in a collision.

About 4 a.m., on the 7th of January, 1876, the bark was about thirty-five miles from the Old Head of Kinsale, bound for Queenstown, and heading N.E. by E., wind light. The steamer was coming from New York to Liverpool by Queenstown, at ten and a half knots an hour, and was astern of the bark. The green and white lights of the steamer were seen by those on board the bark for about a quarter of an hour before the collision, and according to their evidence they thought that the steamer would keep out of the way, and they did not apprehend danger until she was less than one-third of a mile off. The captain of the bark then ordered the bell to be rung, and a lamp to be lighted and shown. The bell was rung, but some delay took place in lighting the lamp, and before it was done the collision took place. The bark went down soon afterwards, and three of 277] the crew were lost. In the *statement of claim it was alleged that a good look-out was not kept on board the steamer; and that she improperly neglected to take in due time proper measures for keeping out of the way of the bark.

The case of the steamer was, that in the position of the vessels she could not see any light on board the bark, and owing to the darkness of the night those on board the steamer, though they kept a good look-out, were unable to discover the bark until at a distance of one or two lengths, when her red light was seen; the engines were immediately

stopped and reversed, and the helm was starboarded; that those on board the bark acted negligently and improperly by omitting to show a light, or otherwise to take proper measures to warn those on board the steamer of the position of the bark.

The action was tried before the judge of the Admiralty Division, assisted by two of the elder brethren of the Trinity House, and a decree was made for the damage (*).

*The defendants appealed, and the appeal was [278 heard by James, L.J., Baggallay, J.A., Lush J., and two nautical assessors.

Butt, Q.C., E. C. Clarkson and Myburgh, for the defendants: The steamer was not wrong in proceeding at full

(*) 1876. February 19. SIR ROBERT PHILLIMORE said that there was no dispute that the steamer was the overtaking vessel, and the bark was the vessel ahead, so that the 17th Art. of the steering and sailing rules applied. The evidence showed that the bark kept her course, and that at the time when she was descried by the steamer no manœuvre on the part of the steamer could have prevented a collision. As to the plea of inevitable accident, his Lordship and the elder brethren were satisfied that the accident could not properly be described as inevitable. The elder brethren were further of opinion that, in such a state of weather as was proved in this case, the bark ought to have been seen at such a distance as would have enabled the steamer to get out of the way. His Lordship would not, however, leave the case solely on that issue. Even assuming that it might be the duty of the bark to do some act to indicate her presence, the elder brethren consider that the bark was, up to the last moment, justified in thinking that the steamer would pass to leeward.

On the same assumption, the next question was, how far the speed of the steamer was proper under the circumstances. Now, she was not far from the Irish coast, where vessels were sure to be met with, and she was going at full speed on a night which her own witnesses described as so dark that she could not see another vessel until almost alongside her. His Lordship was of opinion that such speed, under the circumstances, was improper.

The duty of a vessel ahead to make

any signal, by way of a light, to a vessel overtaking her, had been very much discussed in the two cases of *The Earl Spencer* (33 L. T. (N.S.) 285), and *The Anglo-Indian* (33 L. T. (N.S.), 233). In the latter case their Lordships, in delivering the judgment of the Privy Council, say this: "We are very far from saying that it is never the duty of the vessel ahead to look behind. There may undoubtedly be circumstances of an exceptional character, which may throw upon the vessel ahead the duty of looking behind, and, further, of giving some signal, by the way of a light, or otherwise, to a vessel behind, approaching her under circumstances under which there is reason to suppose that the after vessel does not see the vessel in front, and when there is danger of collision." So far as the statutory regulations are concerned, there was no law binding on the vessel ahead to exhibit a light astern, and if it had been the intention of the legislature that she should be under that obligation, there were several rules in which one naturally would expect to find that obligation expressed, and where it was not so expressed.

But his Lordship was of opinion, and the elder brethren agreed with him, that in this case there were no exceptional circumstances to compel the bark to exhibit a stern light, at least, not until the time when she did attempt to do so.

Looking into all the circumstances of this case, his Lordship was of opinion that the steamer was alone to blame for this collision, and decreed accordingly.

speed on a clear night; but even admitting that she was not right in doing so, there was contributory negligence on board the bark. She ought to have shown a light or made some signal, as she could see the steamer, and might have guessed that the steamer could not see her. *The Earl Spencer* ⁽¹⁾ and *The Anglo-Indian* ⁽²⁾ are authorities on the subject. No doubt the rules are silent as to this case, but there is nothing in the order to exclude ordinary care and precaution: *The Olivia* ⁽³⁾; *The John Fenwick* ⁽⁴⁾; *The Saxonia* ⁽⁵⁾.

Milward, Q.C., and *G. Bruce*, for the I. Mille, were not called upon.

JAMES, L.J.: I am of opinion that we cannot come to any conclusion different from that to which the learned judge of the court below has come, that conclusion being in accordance with the opinion of the nautical assessors upon this matter, which is to a great extent a-matter of nautical skill and science. The learned *judge was of opinion that the ship complained of was going at a speed not to be justified, having regard to the state of the night, the position of the coast, and the probability of there being other vessels in the way; and I am bound to say that however convenient it may be for commerce and for travellers—however convenient it may be to be able to go to America at eleven or twelve miles an hour, that is still a speed at which it does not seem to us to be reasonable for a steamer like this to go when not far from the coast, and on a night so dark that, according to the evidence of their own witnesses, they could not see another vessel more than a length of a ship away. It is said, on behalf of the steamer, that if the other ship did see the steamer she ought to have shown a light. Of course we cannot suppose that any captain would wantonly neglect to take the necessary precautions to save his own life and the lives of his men, therefore we must suppose that he formed the best judgment he could, and did everything that would tend to avoid a collision. Then when he saw the danger, he did, apparently, what he could; he ordered the bell to be rung and a light to be got, but it was too late. I am of opinion, therefore, that whatever may have occurred in other cases, where it was held to be the duty of a ship to warn another of the risk that she was running, there were in this case no such circumstances as to

⁽¹⁾ 33 L. T. (N.S.), 235; 3 Asp. Mar. L. C., 4.

⁽²⁾ 33 L. T. (N.S.), 233; 3 Asp. Mar. L. C., 1.

⁽³⁾ Lush. Adm., 497.

⁽⁴⁾ Law Rep., 3 A. & E., 500.

⁽⁵⁾ Lush. Adm., 410.

show any neglect of duty upon the part of the crew of the Italian ship, or that they did anything to justify our charging them with contributory negligence.

I am, upon the whole, of the same opinion as the court below.

BAGGALLAY, J.A.: I am of the same opinion.

LUSH, J.: I am also of the same opinion. I think the rule of law with regard to travelling at sea is identical with the law of travelling on the high road. No one on a dark night has a right to go at such a rate of speed as not to be able to escape an accident if he happens to follow immediately in the wake of another, whether it be by sea or by land. I think that the rate of speed was an unjustifiable rate for that vessel to run on such a dark night, when she could not discern another vessel until within her own length of that vessel. As to contributory negligence, I do not think there is any necessity for a ship ahead to look out for ships that are behind her unless the danger is apparent. It is only *when there is an apparent danger that the necessity [280 arises to do the best they can for their own safety. Here the persons on board the first ship did so, but when it was too late.

Appeal dismissed with costs.

Solicitor for the I. Mille: *T. Cooper.*

Solicitors for defendants: *Gregory & Co.,* for Duncan, Hill & Dickinson, Liverpool.

[1 Probate Division, 283.]

May 29, 1876.

[IN THE COURT OF APPEAL.]

*THE GLANNIBANTA. (O. 158.)

[283

Appeal—Reversal—Evidence—Collision—Look-out—Negligence.

Where the judge of the court below has come to a conclusion of fact after hearing witnesses, the Court of Appeal will not, except in cases of extreme pressure, reverse his decision; but where the decision of the court below does not depend upon the credibility of the witnesses, but on the inferences from the evidence drawn by the judge, his decision may, even without such pressure, be reversed by the Court of Appeal.

A steamer, with sails up, running through a roadstead ought even by day-time and in fine weather to have a man on the look-out besides the captain on the bridge.

THIS was an action for damages by the owners of the steamship Glannibanta, against the owners of the steamship Transit, for damages incurred in a collision; and there was a counter claim by the owners of the Transit.

The action was heard before Sir Robert Phillimore, judge of the Admiralty Division, assisted by two Elder Brethren

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of the Trinity House; and the judge, after hearing witnesses on both sides, came to the conclusion that the *Transit* was in fault, and decreed judgment accordingly. The owners of the *Transit* appealed.

The facts of the case are stated in the following judgment.

May 17 and 18. *Benjamin*, Q.C., and *Phillimore*, for the *Transit*, as to keeping a look-out, cited *The Ionia* (').

Milward, Q.C., *Butt*, Q.C. and *Clarkson*, for the *Glannibanta*.

Cur. adv. vult.

May 29. The judgment of the court (James, L.J., Bag-284] gallay, *J.A., and Lush, J., assisted by two nautical assessors) was delivered by

BAGGALLAY, J.A.: On the 23d of January, 1876, about 1 p.m., two iron screw steamships, the *Glannibanta* and the *Transit*, came into collision in Yarmouth Roads, and both vessels sustained considerable damage. The weather was fine and clear, the wind in the S.W., blowing a light breeze, with no sea, and the tide on the last quarter ebb, running to the northward. It does not appear that the roadstead was unusually crowded with vessels, and it is difficult to imagine a state of circumstances under which with the use of reasonable precautions a collision was less likely to occur.

On the 25th of January an action for damages in respect of this collision was commenced in the Admiralty Division of the High Court of Justice, by the owners of the *Glannibanta*, against the owners of the *Transit*, and was met by a counter claim for damages on the part of the latter.

The action came on for hearing before the judge of the Admiralty Division on the 20th and 21st of March. On the latter day the learned judge decided that the *Transit* was alone to blame, and made the usual order for assessing the damage sustained by the *Glannibanta*, and from that decision the present appeal is brought.

The *Glannibanta* was a vessel of 534 tons register, and was proceeding from London to the Tyne in ballast; the *Transit* was of 345 tons register, and was on a voyage from Grimsby to Dieppe with a general cargo. Shortly before the collision, the *Glannibanta* had come through Hewitt's Channel, and had passed the St. Nicholas light-ship on her course northwards, and the *Transit* had passed the Bell Buoy on her course southwards; the collision took place between the South Elbow and south-west Scroby Buoys, at a distance from the Scroby Sands of from a quarter to half a mile.

(') Law Rep., 1 P. C., 426.

The plaintiffs allege that, immediately after passing the St. Nicholas light-ship, the Glannibanta, which had previously been steering N. by W., ported her helm so as to change her course to N. $\frac{1}{2}$ E., and proceeded down the roads at the rate of about nine knots an hour; that shortly before 1 p.m. those on board her saw the Transit approaching, bearing about two points on the port *bow, and [285 at the distance of from half to three quarters of a mile; that the helm of the Glannibanta was again slightly ported, and she was kept on her course with the intention of passing the Transit, port side to port side, but that the Transit, instead of passing the Glannibanta on her port side, suddenly, and with the apparent intention of crossing the bows of the Glannibanta, starboarded her helm, and, although the engines of the Glannibanta were immediately stopped and reversed, and her helm was starboarded, the starboard side of the Transit, abreast of her foremast, came into contact with the stem of the Glannibanta.

The defendants, on the other hand, allege that when the Transit first observed the Glannibanta, the latter was about a mile ahead, that the Transit was then heading about S. by W., well over to the east side of the roads, and proceeding at the rate of about eight knots an hour, that the Glannibanta was not then approaching so as to pass port side to port side, but was continuing on her N. by W. course, by which she had passed the light-ship, and was apparently heading to the town of Yarmouth, and communicating with the shore by signals; that the Transit, in this belief, and expecting the Glannibanta to pass starboard to starboard, starboarded about two points; but the Glannibanta suddenly ported, then, for the first time, straightening down the roads, and the vessels were almost immediately in collision, notwithstanding the stoppage and reversal of the engines of the Transit. The defendants further allege that there was no proper or sufficient look-out on board the Glannibanta, and that when she so ported, those on board her were not aware that the Transit was so close to them, and only discovered the fact after they had ported, and when the collision was inevitable.

It is not immaterial to note that, having regard to the speed at which the two vessels were proceeding, they were nearing each other at the rate of about a mile in three minutes to three minutes and a half.

Now, the substantial question which had to be decided in the Court of the Admiralty Division, and which has to be decided by us in the present appeal, is as to the time at which

the Glannibanta straightened her course from N. by W. to N. $\frac{1}{2}$ E.—whether she did so at the time of, or immediately 286] after, passing the St. *Nicholas light-ship, as alleged by the plaintiffs, or whether, as alleged by the defendants, she continued on her N. by W. course for some half a mile or three quarters of a mile after she had passed the light-ship, and then, and not till then, straightened her course. If the former be the correct view of the case, it is clear, upon the evidence, that the Transit was in error in starboarding when she did; and if the latter is the correct view, it is equally clear, upon the evidence, that the Glannibanta ought not to have ported when in such close proximity to the Transit.

This question was decided by the learned judge of the Admiralty Division in accordance with the plaintiff's contention, and he appears to have been much influenced in arriving at this conclusion by the course taken by another steamer, the Paradox, which was at the same time proceeding to the north, and by the evidence given by persons who were on board the Paradox respecting the movements of the Glannibanta and the Transit. The Paradox had passed the St. Nicholas light-ship somewhat in advance of the Glannibanta, and had changed her course on passing the light-ship from N. by W. to N. $\frac{1}{2}$ E. so as to straighten down the roads, and on meeting the Transit had passed her port side to port side. From this the learned judge very justly inferred that the course so made by the Paradox was the natural and proper course for any other ship similarly circumstanced, and having stated that in his opinion the natural course for the Glannibanta was to have ported immediately on passing the light-ship, he proceeded to refer to the argument which had been addressed to him on the part of the defendants, and which was the same in substance as has been addressed to us here, in the following terms: "The porting on passing the light-ship is not denied to have been her natural course; but it has been contended, and with very great power, that her fault was this, that she went towards Yarmouth further than was necessary or proper, and thereby brought her starboard side open to the Transit, who, on seeing the starboard side, was justified in starboarding."

To this argument, and the evidence upon the subject of it, the learned judge next addressed himself, and having stated that in the conflict of evidence he and the Elder Brethren of the Trinity House were of opinion that they 287] might safely rely upon the *testimony of those who

had been on board the *Paradox*, he acted upon the evidence of those witnesses, and considering it to be thereby established that the *Glannibanta* had followed in the wake of the *Paradox*, he held that the *Transit* had starboarded when the *Glannibanta* was on her port bow, and had thus caused the collision, for which she was alone to blame.

If this view be correct, it of course negatives the contention of the defendants that the *Glannibanta* continued on her course of N. by W. for some distance after she had passed the light-ship. In the course of the argument on behalf of the plaintiffs we were much pressed with the language from time to time made use of by the Judicial Committee of the Privy Council in Admiralty cases, and particularly in the cases of *The Julia* (') and *The Alice* (²), to the effect that if in the Court of Admiralty there was conflicting evidence, and the judge of that court, having had the opportunity of seeing the witnesses and observing their demeanor, had come, on the balance of testimony, to a clear and decisive conclusion, the Judicial Committee would not be disposed to reverse such decision, except in cases of extreme and overwhelming pressure; and it was urged upon us that in the present case there was no such extreme and overwhelming pressure as should induce us to reverse the decision of the Admiralty Division as to the question of fact upon which its decision was based.

Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanor and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on question of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.

*In the present case it does not appear from the [288 judgment, nor is there any reason to suppose, that the learned judge at all proceeded upon the manner or demeanor of the witnesses; on the contrary, it would appear that his judgment in fact proceeded upon the inferences

(¹) 14 Moo. P. C., 210.

(²) Law Rep., 2 P. C., 245.

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which he drew from the evidence before him, and which we have really the same means of considering that he had, and with this further advantage, that we have had his view of the inferences to be drawn from the evidence as well as the evidence itself made the subject of elaborate and able discussion on both sides.

Having given our best consideration to the evidence in this case, we are unable to arrive at the same conclusion as that arrived at by the learned judge of the Admiralty Division. It is quite true, as has been already stated, that the evidence of the captain and helmsman of the *Paradox* is to the effect that, in their opinion, the *Glannibanta* ported her helm immediately after she had passed the light-ship, and that such evidence is in accordance with the statements of the captain and helmsman of the *Glannibanta*, but it is in our opinion clear, from the circumstances to which we are about to advert, and to which the attention of the judge of the Admiralty Division does not appear to have been directed, that these witnesses must have been mistaken. The captain of the *Glannibanta* himself most distinctly states that he saw the *Transit* directly after he ported, and that she was then about half a mile or a little more from the *Glannibanta*, and this is supported by other persons who were on board the *Glannibanta*. Now, there is no dispute that the point at which the collision took place was upwards of a mile to the north of the light-ship, though there is some slight difference of opinion as to the distance from *Scroby Sands*, and as the two vessels were approaching each other at about equal rates, the *Transit* must at the time when the *Glannibanta* passed the light-ship have been at least a mile to the north of the point of collision and at least two miles from the *Glannibanta*, and had the *Glannibanta* ported her helm immediately on passing the light-ship, the *Transit*, when first seen from the *Glannibanta*, must have been at least two miles distant instead of half a mile or three quarters of a mile, which most of the 289] *witnesses, except those who were on board the *Paradox*, agree in treating as about the distance between the two ships when the *Glannibanta* straightened her course.

If, however, as is contended by the defendants, the *Glannibanta* did not port her helm until she had left the light-ship more than half a mile behind her, she would have been when she ported about half a mile to three quarters of a mile from the *Transit*, each being about a quarter of a mile from the eventual point of collision.

Under these circumstances, having given our best consideration to all the evidence in the case, and having had the benefit of the advice of the nautical assessors, by whom we have been assisted on the present occasion, we have arrived at the following conclusions, in which they entirely concur :

1. That the Glannibanta continued on her course for more than half a mile after she had passed the light-ship, whether or not she did so for the purpose of interchanging signals with Yarmouth, as suggested by the defendants, it is immaterial for us to consider. The fact is proved to demonstration by the evidence of the captain of the Glannibanta, and it follows from this,

2. That by keeping on this course she led those on board the Transit to believe, and that they were justified in believing, that she was making for Yarmouth and would pass them starboard to starboard.

3. That, having regard to these circumstances, the Transit was fully justified in starboarding when the Glannibanta was first seen from her deck, and that the Glannibanta was not justified in porting when in such close proximity to the Transit.

4. That the collision was occasioned by such improper porting of the Glannibanta, it being practically impossible to avoid a collision after the course of the Glannibanta had been changed.

In arriving at these conclusions we are doubtless dissenting from the views expressed by the captain and helmsman of the Paradox, upon which the judge of the Admiralty Division relied, but we can well understand how in such a case persons desiring to speak with the most perfect honesty and accuracy may have been mistaken. There was nothing in the surrounding circumstances *prior to the collision to direct the attention of the people on board the Paradox to the movements of the Transit and the Glannibanta, so as to induce them to watch such movements with any particular nicety, and the want of accuracy in such casual notices as were taken is exemplified by the circumstance that the captain of the Paradox states that the Glannibanta, after she had straightened her course, was a quarter of a mile astern of him, whilst his helmsman makes the distance 200 yards only, and the captain of the Glannibanta says he was as much as half a mile or nearly so astern.

We cannot part with this case without expressing our surprise that there should have been no proper or sufficient

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look-out on board the Glannibanta, for had there been a proper look-out, and the Transit had been seen from the Glannibanta, as in such case she must have been before the latter ported, we cannot for a moment suppose that that change of course would have been made. The captain of the Glannibanta, in his examination, stated that it was not a customary thing to keep a man on the look-out in the day-time on board ships belonging to his owners; and, on the occasion in question, until after she had ported, the captain was the only person on the look-out, and he was on the bridge, with his view forward limited by reason of the sails on his own ship to four points on his starboard bow. A very different course was pursued by the Transit, on board of which an efficient look-out was kept by her captain and mate on the bridge and by a seaman well forward in the bows.

We have only further to remark that, having regard to the fact that the Transit had a proper and sufficient look-out in every direction, the course pursued by her of starboarding when she first saw the Glannibanta would be quite inexplicable if the vessels had been approaching each other port side to port side, as contended for by the plaintiffs. It appears to us impossible to adopt the suggested explanation of the plaintiffs that by crossing the bows of the Glannibanta the Transit might save a little distance in her course to the south, and that that was her object in starboarding. On the other hand, we can well understand that the Glannibanta, having no sufficient look-out, ported her helm in 291] *ignorance of the position of the Transit, and simply with the view of straightening her course down the roads.

The Transit was, in our opinion, very carefully and cautiously handled. The Glannibanta was carelessly and recklessly managed in changing her course in ignorance of the position of another vessel, which was only half a mile off. It is possible, no doubt, that the careful ship may have blunderingly gone wrong, and that the careless ship may by accident have gone right, but the burthen of proof on the latter is then very heavy, and the Glannibanta has certainly not discharged it in this case.

It may be well to add that, having regard to the position of the Glannibanta and Paradox in passing the light-ship, and their position when the Glannibanta sighted the Transit, the Glannibanta, the faster ship, must have lost, instead of gaining, ground, which can only be accounted for by the one having taken a straight and the other a devious course.

Upon the whole, we are of opinion that the Glannibanta was alone to blame, and that consequently the appeal must be allowed, the order of the court below discharged, and the usual order of reference made for assessing the damage sustained by the Transit.

The costs both in the court below and of the appeal must follow the result.

Judgment reversed.

Solicitors for the Transit: *Pritchard & Sons.*

Solicitors for the Glannibanta: *Stokes, Saunders & Co.*

C A S E S
DETERMINED BY THE
CHANCERY DIVISION
OF THE
HIGH COURT OF JUSTICE,
AND BY THE
CHIEF JUDGE IN BANKRUPTCY,
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE
AND IN
L U N A C Y.

[2 Chancery Division, 489.]

C.A., April 6, 1876.

489] **In re* WITT. *Ex parte* SHUBROOK.

Custom of Trade—General Lien—Packer.

A packer is entitled to a general lien on the goods of his customer which are in his hands.

THIS was an appeal from a decision of Mr. Registrar Pepys, acting as Chief Judge in Bankruptcy.

G. A. Witt & Co., general merchants, filed a liquidation petition, under which J. Shubrook was appointed trustee: Perrott & Perrott were packers, and the debtors had been in the habit of employing them to pack goods for them for shipment abroad. The goods, when purchased by the debtors, were sent to the warehouse of Perrott & Perrott, where they were warehoused, packed, and sent off for shipment as directed by the debtors. At the commencement of

the liquidation, Perrott & Perrott had in their warehouse various parcels of goods belonging to the debtors, which had been sent to them at different times, and there was due to them from the debtors the sum of £28 19s. 7d., being the amount of their charges for packing other goods for the debtors. The trustee requested Perrott & Perrott to pack all the goods in one case and forward them to the docks for shipment. This was done, and their charge for doing it was £2 1s. They claimed to be entitled to a general lien on the goods, and refused to deliver them up except upon [490 payment by the trustee, not only of the £2 1s., but also of the £28 19s. 7d. The trustee tendered the £2 1s., and demanded delivery of the goods, which was refused. He then applied to the court for an order that Perrott & Perrott should deliver up the goods on payment of the £2 1s.

Affidavits were made by two persons engaged in the trade of packers to the effect that by the custom of trade a packer has a general lien upon the goods of his customers in his possession for the amount of his charges, not only in respect of the particular goods, but also in respect of any other goods of the customer. In opposition to this evidence, one of the debtors made an affidavit in which he said that neither he nor his co-debtor knew of any such alleged custom of trade. The Registrar was of opinion that the lien claimed was established, and he dismissed the trustee's application with costs. The trustee appealed.

Davey, Q.C., and *F. O. Crump*, for the appellant: The Registrar founded his decision on *Ex parte Deeze* (*). In many text-books, no doubt, that case has been treated as showing that packers have a general lien, and the marginal note is to that effect. But when the case is looked at, it is evident that the marginal note is wrong, and that the decision was based upon the mutual credit clause. *Ex parte Ockenden* (*) and *Rose v. Hart* (*) show that it was so. To establish a general lien by implication, it must be shown, either that its existence was actually known to the person against whom it is claimed, or that it exists by virtue of a custom of trade so widely known that the court will impute knowledge of it to him: *Holderness v. Collinson* (*). The law does not favor general lien: *Bock v. Gorrisen* (*). In the most recent text-books on mercantile law, packers are not mentioned among the persons who have a general lien.

(*) 1 Atk., 228.

(*) Ibid., 235.

(*) 8 Taunt., 499.

(*) 7 B. & C., 212.

(*) 30 L. J. (Ch.), 39.

[*De Gex*, Q.C., for Perrott & Co., referred to *Savill v. Barchard* ⁽¹⁾, in which Lord Kenyon said that packers had a general lien, and to *Green v. Farmer* ⁽²⁾, in which Lord 491] Mansfield said it *was settled in 1755 that a packer, being in the nature of a factor, would be entitled to a lien.]

That was because packers then often acted as factors, making advances to their principals, which they do not do now. In the recent case of *Achard v. Ring* ⁽³⁾, although an alleged custom had been in a prior case found judicially by the Court of Queen's Bench, yet, on the evidence, the jury, in accordance with the direction of Cockburn, L.C.J., found that the alleged custom did not exist.

De Gex, Q.C., and *Brough*, for the respondents, were not called on.

JAMES, L.J.: I think it is too late now to attempt to set aside that which has been considered law for so many years, and I must say I do not see the injustice of it. I agree with what Lord Hardwicke said in *Ex parte Deeze* ⁽⁴⁾; it seems to me to be very good sense and justice. A man has goods in his possession which he has received in the ordinary course of trading, and he is asked to deliver them up, and at the same time he has a claim against the person who asks him to deliver them up. I think he has a perfect right to keep them. Under the Judicature Acts, I think, if an action were brought for the goods in trover or detinue, by means of a counter claim, the whole matter might be settled in one action. I certainly think this law with regard to lien is a very proper one; it has been settled for a great many years, and I do not see why we should endeavor to limit the effect of the decisions. The Registrar's order must be affirmed.

MELLISH, L.J.: I am of the same opinion. From what Lord Mansfield said in *Green v. Farmer* ⁽⁵⁾, and what was said by Lord Hardwicke in *Ex parte Deeze*, it seems to me clear that in the middle of the last century it was settled that a packer had a general lien. At that time packers were to a certain extent considered as factors; they used to make advances to their customers. But, it having been 492] *established that packers had a general lien at that time, I cannot think the circumstance that they do not now so frequently as they did then make advances should be sufficient to take away their right of general lien. It having been established that they had such a lien then, there can

⁽¹⁾ 4 Esp., 53.

⁽²⁾ 4 Burr., 2214.

⁽³⁾ 31 L. T. (N.S.), 647.

⁽⁴⁾ 1 Atk., 228.

be little doubt that it would continue. Therefore, in the present case, if a single affidavit of the custom had been produced, that would have been sufficient evidence, if any evidence is required at all. If the existence of this lien is ever seriously to be contested, and it is sought to prove that by the present usage of trade packers have not a general lien, it must be done in quite a different way from merely bringing the customer himself to say that he never heard of the general lien. I think the determination of the Registrar was right.

BAGGALLAY, J.A.: I am of the same opinion.

Solicitors for trustee: *W. A. Crump & Son.*

Solicitor for packers: *G. H. Cole.*

[2 Chancery Division, 494.]

M.R., Feb. 11, 1876.

*UNDERHILL V. RODEN.

[494

[1875 U. 9a.]

Will—Gift over on Wife's Second Marriage—Death of Wife without marrying again—Words "Children and Issue and their Heirs"—Estates Tail—Rule in Wild's Case.

Testator gave his real and personal estate to a trustee upon trust to pay the proceeds to his wife for the maintenance and education of his children until the eldest should attain twenty-five, or until his wife should marry again; and, in case of her second marriage before any of his children should attain twenty-five, to pay her £30 a year, and apply the residue towards the maintenance and education of his children; and when his two sons should attain twenty-five, then to raise certain sums for them; and pay the proceeds of the residue to his wife if she should be then unmarried, but in case she should marry again, then, after providing an annuity for her for her separate use, to pay the residue equally between the testator's children and their issue and their heirs as tenants in common; and in case both his children should die under twenty-five without leaving issue, then to give the proceeds to his wife for life; and after her death the said property to be in trust as to one moiety for the wife, and as to the other for the trustee absolutely.

The wife survived the testator and died without having married again, leaving the testator's only two sons surviving, who had since attained twenty-five, but who had no issue:

Held, that the gift over of the real estate on the second marriage of the wife took effect on her death:

Held, also, that the sons took equitable estates tail according to the rule in *Wild's Case* ⁽¹⁾.

Pile v. Saller ⁽²⁾ disapproved.

SPECIAL CASE. Richard Roden, by his will, dated the 23d of November, 1852, appointed the plaintiff, John Underhill, his executor, and gave, devised, and bequeathed all his real and personal estate to the said J. Underhill upon trust to pay the rents and profits of his real estate, and also the

⁽¹⁾ 6 Rep., 16 b.

⁽²⁾ 5 Sim., 411.

interest, dividends, and annual income of his personal estate to his wife for her maintenance and support, and for the education and support of his children till the eldest should attain twenty-five years, or until his wife should marry again, whichever event should first happen: And, in case of the second marriage of his said wife before any of 495] his children should attain *twenty-five years, he directed his said trustee to pay to his wife £30 a year out of the proceeds of his real and personal estate, the residue of the said proceeds to be applied towards the maintenance, education, and support of such of his children as should then be living; and, when his eldest son attained twenty-five, he directed that the said trustee should raise the sum of £700 by sale, or mortgage, or otherwise of his said real and personal estate, and pay the same to his eldest son for his own absolute use, and a like sum in like circumstances for his second son; but in case only one of his said sons should live to attain the age of twenty-five years, his trustee was to raise the sum of £1,400 for the absolute use of such only son: And when his said sons, or such survivor of them, should have attained the age of twenty-five years, the trustee was to pay the proceeds of the residue of the said real and personal estate, after raising the said sums of £700 and £700, or the said sum of £1,400, to his said wife for her life in case she should then be unmarried, but in case she should marry again, then the trustee was to sell and invest so much of the said real and personal estate as should produce £30 a year, and pay the same to his wife for her separate use, and should pay the residue of his said real and personal estate unto and equally between his said children and their issue, and their heirs and assigns, share and share alike as tenants in common and not as joint tenants; and in case of the death of both of his said children before attaining their respective ages of twenty-five years without leaving lawful issue, the trustee was to pay the whole of the said proceeds of his real and personal estate to his said wife for her life and separate use, and after her decease his said trustee was to hold the real and personal estate to the uses thereafter declared, that was to say, as to one moiety, as his wife should by deed or will appoint, and in default of and subject thereto, to the use of his said wife, her heirs and assigns forever; and in case the said J. Underhill should be living at the death of his said wife, in case his said children should have died before attaining their respective ages of twenty-five years without leaving lawful issue, then as to the other remaining moiety, to the use of the said J. Underhill, his heirs, executors, admin-

istrators, and assigns forever: But in case of the decease of the said J. Underhill before the happening *of the [496 said event lastly thereinbefore provided for, then to the use of and amongst all and every the child or children of the said J. Underhill who should be living at his decease, and their issue, share and share alike as tenants in common and not as joint tenants.

The testator died in December, 1852, having had two sons only, the defendants F. W. Roden and R. J. Roden.

The testator's widow died in May, 1853, without having married again; the two sons were then both under age, but had since respectively attained the age of twenty-five.

The said sums of £700 in the will mentioned had not yet been raised.

At the time of his death the testator was seised of a certain freehold property called "The Moor," which formed the whole of his estate.

The questions submitted for the opinion of the court in the special case were:

1. Whether the said F. W. Roden and R. J. Roden and their issue, or any of them, took any, and if any, what, estate in The Moor under the said will of the testator?

2. Whether the said F. W. Roden took any, or what estate in The Moor as heir-at-law of the testator?

3. Whether the legal estate in fee in The Moor is now vested in the said J. Underhill under the said will?

Plumptre, for the trustee.

Manby, for the eldest son, the heir-at-law: The gift over on the contingency of the wife's second marriage has failed by reason of her death without having married again. This is not one of the cases like *Luxford v. Cheeke* ⁽¹⁾ and *Gordon v. Adolphus* ⁽²⁾, where the wife's second marriage can be construed as if it were second marriage or death, for here the testator directs an annuity to be raised and paid to his wife in the event of her second marriage.

The case is governed by *Pile v. Satter* ⁽³⁾. There a testator *made certain bequests to his wife in trust for her [497 as long as she remained a widow, and upon her marrying again he bequeathed to her one-third of his property not then disposed of, and the remaining two-thirds to her nieces. The widow died without having married again, and it was held that the residue was undisposed of. That case was referred to in *Eaton v. Hewitt* ⁽⁴⁾. I contend that there is an intestacy, and that the heir-at-law is entitled.

⁽¹⁾ 3 Lev., 125.

⁽²⁾ 3 Bro. P. C., 306.

⁽³⁾ 5 Sim., 411.

⁽⁴⁾ 2 Dr. & Sm., 184, 192.

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Underhill v. Roden.

M.R.

B. B. Rogers, for the second son: The two sons are entitled to estates tail according to the rule in *Wild's Case* (*).

JESSEL, M.R.: It is a great pity when a general rule of this kind is well established that judges should not follow it. The general rule is extremely well expressed, if I may say so, in *Eaton v. Hewitt*, by a very distinguished judge in these terms: "It is a rule now well established that where a testator gives to a woman a life interest if she so long remains unmarried, and then directs that in the event of her marrying the property shall go over to another, although, according to the strict language, the gift over is expressed only to take effect in the event of the marriage of the tenant for life, the gift over is held to take effect, even though the tenant for life does not marry."

The rule is again stated thus by another distinguished judge in *Browne v. Hammond* (*): "It appears to me clear that I am concluded by the authorities which have determined that a devise or bequest over, though in terms made upon the marriage of the donee of the preceding estate, is to be extended by implication, so as to take effect on the determination of that estate by death." In that case the gift was to the wife so long as she should remain the testator's widow, without being expressly for her life.

Against these authorities there is the case of *Pile v. Salter* (*), which appears to me wrongly decided. It was 498] cited in both the *cases I have mentioned, and not followed. In that case the Vice-Chancellor Shadwell, referring to the contention that the gift took effect upon the widow marrying again or dying, said: "It would be absurd to give her one-third of the property in the event of her death." I am at a loss to see any absurdity in it. Is there anything absurd in giving a person a life interest in the whole of the property, and an absolute interest in part? The fact is, the testator was contemplating two different things, the one a provision for his wife during her life, and the other a disposition of the *corpus* after her death.

If a case exactly similar to *Pile v. Salter* (*) had come before me, I should have considered that it was not in accordance with the general rule, and should therefore have declined to follow it. But in this case there are strong reasons for holding that the gifts over on the wife's second marriage take effect on her death, independently of the general rule; for though the House of Lords has decided that we cannot in the slightest degree impugn any well established rules of construction, yet it has also decided

(*) 5 Rep., 16 b.

(*) Joh., 210, 214.

(*) 5 Sim., 411.

that every case must be decided on its own words where not covered by authority.

The testator, after directing his trustee to pay the annual proceeds of the residue of the real and personal estate (after raising the two sums of £700 for his sons) to his wife for her life, "in case she should then be unmarried," directs that, "in case she should marry again," then the trustee should sell so much of the said real and personal estate as should produce £30 a year, and pay the same to his wife for her separate use, and pay the residue unto and equally among his children. It might have been said that the word "then" meant not "at that time," but "in that case." I assume, however, that the meaning is "at that time." Then, in case of the death of both his sons under twenty-five without leaving issue, he directs the trustee to pay the proceeds of his estate to his wife for life, and as to one moiety, as she shall by deed or will appoint. As regards that moiety there is no absurdity in the disposition. Then, as to the other moiety, the testator directs that in case John Underhill should be living at the death of his wife, in case his children should have died before attaining *the [499 age of twenty-five without leaving lawful issue, then his trustee should hold the remaining moiety to the use of John Underhill absolutely.

Can anything be more capricious than to suppose that the ultimate gift to John Underhill was dependent on the wife's marrying again, an event with which he had nothing to do? Or why should the wife's own interest in the moiety depend upon her marrying again? The result is, that the gift over takes effect on the death of the wife as well as on her marrying again. I am of opinion that the legal estate in The Moor is in the trustee, as he is directed to raise the sum by sale or mortgage, and that the two sons take equitable estates tail according to the rule in *Wild's Case* (*).

Solicitor: *H. G. Field*, agent for H. & J. E. Underhill, Wolverhampton.

(*) 6 Rep., 16 b.

See 10 Eng. Rep., 880 note; 13 Eng. note; Jones v. Jones, 16 Eng. Rep., 726 note; 15 Eng. Rep., 823 885; 13 Upper Can. Law Jour. 241.

[2 Chancery Division, 499.]

M.R., March 17, 20, 1876.

LYSAGHT v. EDWARDS.

[1875 L. 20a.]

Vendor and Purchaser—Contract to sell Real Estate—Death of Vendor before Completion—General Devise of Real Estate upon Trust for Sale—Devise of Trust Estates.

In 1874 the plaintiffs entered into a contract for the purchase of real estate. After the title had been accepted, and before completion, the vendor died, having by his will (dated in 1873) given his personal estate to E., whom he appointed executor, and devised all his real estate to H. and M. upon trust for sale, and having also devised to H. alone all the real estate which at his death might be vested in him as trustee:

Held, that the real estate contracted to be purchased by the plaintiffs passed to H. under the devise of trust estates.

Wall v. Bright (1) commented on and explained.

ON the 23d of December, 1874, an agreement in writing was entered into between Samuel Bedford Edwards and the plaintiffs, whereby S. B. Edwards agreed to sell, and the plaintiffs agreed to purchase, at the price of £59,750, a mansion house called The Bury, and certain messuages, farms, and lands (comprising in the whole 775A. 1R. 36P.), 500] situate in the parish of Arlsey, in the *county of Bedford, partly freehold and partly copyhold. The agreement provided that the vendor should, before the completion of the purchase, procure the copyholds to be enfranchised; that £3,000, part of the purchase-money, should be paid at once, and the residue on the 11th of October, 1875; and that on payment of the balance of the purchase-money the vendor should execute a proper conveyance.

Part of the property which formed the subject of the contract consisted of a farm and lands called the Bury Farm.

The deposit of £3,000 was duly paid. An abstract of title was delivered, and, after requisitions had been made thereon, the title was accepted by the plaintiffs on the 1st of May, 1875.

S. B. Edwards died on the 12th of June, 1875, having made a will dated the 22d of July, 1873, which, so far as material, was as follows:—

“I appoint my wife, Emily Clara Charlotte, sole executrix of this my will. I give to my wife all my personal property whatsoever and wheresoever. I bequeath to each

(1) 1 Jac. & W., 494.

of my trustees hereinafter named the legacy of £100. Also I bequeath the legacy of £2,000 to my cousin, Elizabeth Barwick. I charge such part of my real estate as consists of my messuage, farms and lands at Arlsey aforesaid, called the Bury Farm, in exoneration of my personal estate, with the payment of my debts and of the pecuniary legacies aforesaid, and subject to the trust hereinafter contained for sale of the same hereditaments, and to the power of postponing such sale. I direct the said debts and legacies to be raised under the statutory power for that purpose. I devise to my cousin, Egerton Hubbard, of Addington Manor, in the county of Buckingham, and my friend, Mr. William Muller, junior, of No. 4 St. Helen's Place, Bishopgate Street, their heirs and assigns, all my real estate whatsoever and wheresoever of freehold tenure (except such hereditaments as are now vested in trustees for sale under and by virtue of a certain indenture of settlement dated the 30th day of March, 1830, and certain indentures indorsed thereon), and my beneficial interest in such excepted hereditaments. And I give and devise such part of my real estate as is of copyhold tenure to the use of such person or persons, and in such manner as the said Egerton Hubbard and William Muller, junior, or the *survivor of them, or the executors or [501 administrators of such survivor, or other the trustees or trustee for the time being of this my will shall, by any deed or deeds for the purpose of carrying into effect any sale which shall be made under the trust hereinafter declared, appoint. And I give to the said Egerton Hubbard and William Muller, junior, their executors and administrators, all net moneys and proceeds to arise by sale of the said freehold and copyhold hereditaments respectively vested and covenanted to be vested in trustees in that behalf under and by virtue of the said indentures upon the trusts hereinafter mentioned. And I declare that the said Egerton Hubbard and William Muller, junior, or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will, hereinafter called my trustees or trustee, shall sell and convert into money the said real estate hereinbefore devised as soon as conveniently may be after my death (but subject to the proviso hereinafter contained in regard to the said sale), and shall, with and out of the moneys to arise by such sale as last aforesaid, and of the net moneys and proceeds to arise by sale under and by virtue of the said settlement, pay my funeral and testamentary expenses, my debts and the pecuniary legacies aforesaid, and shall invest the resi-

due of the said moneys in or upon some or one of the modes of investment prescribed by the power in that behalf herein-after contained, and shall stand possessed of the said moneys and investments in trust for my wife during her life, and after her death" upon certain trusts therein mentioned. And the will then proceeded as follows: "Provided and I declare my said trustees or trustee shall be at liberty to postpone the sale of my real estate hereinbefore devised, or any part thereof, as they or he, on the request in writing of my wife, shall think fit; and during the suspense of such sale I empower my said trustees or trustee to permit my wife to occupy my mansion and such of the land and grounds occupied therewith as she may require, so long as she shall think fit, and to let all such other parts of my real estate hereinbefore devised for the time being remaining unsold, by demising the same from year to year, or for any number of years not exceeding ten years, at rack or improved yearly rents, and on the usual conditions. And 502] I direct *my said trustees to apply such part of the said rents as may be necessary for the purpose in and about the repair of any part of my real estate, consisting of houses, buildings, and fences adjoining any part thereof, and insuring the same, or such of them as for the time being shall remain unsold, against loss or damage by fire. And I hereby declare that the rents of my real estate hereinbefore devised and for the time being remaining unsold, subject to such application thereof as hereinbefore mentioned, and after payment of interest on any moneys hereby authorized to be raised on mortgage, shall be paid and applied by my said trustees or trustee in the same manner as the income of the residue of net moneys and investments will be applicable when my real estate shall have been sold and invested. And I devise to the said Egerton Hubbard, his heirs and assigns, all real estate which at my death may be vested in me as trustee, subject to the trusts affecting the same."

The enfranchisement of the copyholds comprised in the grant had not been completed at the death of S. B. Edwards, who was himself the tenant on the court rolls.

Upon the death of S. B. Edwards the question arose whether the concurrence of his heir-at-law or customary heir was necessary in order to give a complete title and conveyance to the plaintiffs; and in order that it might be decided an action for specific performance was commenced by the plaintiffs against Emily Clara Charlotte Edwards, Egerton Hubbard; and William Muller, and the question was

then raised by a special case under the rules of court, 1875, Order XXXIV, Rule 2.

Cookson, Q.C., and Cozens Hardy, for the plaintiffs: A devise of trust estates does not pass estates in which the testator had a beneficial interest, or, at all events, of which he was merely a constructive trustee: *Wall v. Bright*(¹); *Purser v. Darby*(²); *In re Cuming*(³). In such cases as the present, the heir-at-law cannot be treated as a trustee until a decree for specific performance has been obtained: *In re Carpenter*(⁴); *Cresswell v. Haines*(⁵); *Goold v. Teague*(⁶). This is the general understanding *of conveyancers: [503 *Davidson's Conveyancing*(⁷); and it is borne out by *Thirtle v. Vaughn*(⁸); *Martin v. Laverton*(⁹).

If the legal estate does not pass under the devise of trust estates, it cannot pass under the general devise contained in the will, which is a devise to trustees upon trust to sell in pursuance of directions thereafter given, not to carry out a sale made by the testator. The trustees are not the legal personal representatives of the testator, and consequently cannot give a receipt for the purchase-money due from the plaintiffs. Even if the trustees took the legal estate in the freeholds under the general devise, they have no legal estate in the copyholds, over which the testator gives them a mere power of appointment.

Chitty, Q.C., and Kekewich, for the defendants: We say that the legal estate passed under the devise of trust estates. The most difficult portion of the case relates to the Bury Farm, and even as regards it we contend that it did not pass under the general devise upon trust for sale. The will must be read as if it had been executed immediately before the death of the testator. It contains no specific devise of Bury Farm, nor any specific description of real estate. The words, "subject to the trusts for sale hereinafter contained," must be read "subject to the trusts hereinafter contained so far as they affect the same."

The question whether real estate contracted to be sold passes at law under a devise of trust estates depends on the question whether there was a binding contract for sale at the death of the testator. If there was a binding contract, the legal estate passes: *Rose v. Watson*(¹⁰); *Shaw v. Foster*(¹¹). Here the title had been accepted in the testator's

(¹) 1 Jac. & W., 494.

(²) 4 K. & J., 41.

(³) Law Rep., 5 Ch., 72.

(⁴) Kay, 418.

(⁵) 10 W. R., 121.

(⁶) 5 Jur. (N.S.), 116.

(⁷) 2d ed., vol. iv, p. 56.

(⁸) 2 W. R., 632; 24 L. T. (O.S.), 5.

(⁹) Law Rep., 9 Eq., 563.

(¹⁰) 10 H. L. C., 672.

(¹¹) Law Rep., 5 H. L., 321.

lifetime, and there can be no question that the contract was binding at his death.

Cookson, in reply.

JESSEL, M.R.: This case is an illustration, if another 504] illustration were wanting, *of the great difficulties which arise from deciding cases for the purpose of convenience, instead of allowing the Legislature to intervene for the purpose of correcting any defects in the law. Had it not been for the case of *Wall v. Bright* (¹), I should not have thought the present special case arguable. As it is, I confess that I decide it with something like hesitation, not because I doubt at all as to the way in which it ought to be decided, but because I cannot help thinking that it is impossible for me at this distance of time to say that *Wall v. Bright*, as decided, is not law, and that I must consider what the effect of that case is, not merely having regard to the facts of it, but also having regard to the reasons given by the learned judge who pronounced it, and to the effect which that case may have had upon subsequent titles, and the practice of conveyancers. Notwithstanding that, I cannot help considering this case in the first instance independently of that decision, and stating the conclusion I should have come to without that decision, and the reasons for it; and then I shall take into consideration the effect, if any, which that case ought to have upon my ultimate decision.

In this particular case the testator made his will on the 22d of July, 1873. He was at that time owner in fee of certain freehold estates, and he was also owner of certain copyhold estates. Among his estates was a farm called Bury Farm, partly freehold and partly copyhold. By his will he charges such part of his real estates as consisted of the Bury Farm, with debts and pecuniary legacies, and he proceeds: "Subject to the trusts hereinafter contained for sale of the same hereditaments, and to the power of postponing such sale, I direct the said debts and legacies to be raised under the statutory power for that purpose." Then he gives to two gentlemen, named Hubbard and Muller, all his real estate, with a certain exception, which it is not material to mention, and he devised all his copyhold estates to the use of such persons as they might appoint for the purpose of carrying into effect any sale which should be made under the trusts thereafter declared, and then he gave them the net proceeds of the sale upon the trusts therein mentioned. There is, therefore, a gift of the freehold estate upon trust

(¹) 1 Jac. & W., 494.

to sell, and of the copyhold to such uses *as they [505 shall appoint for the purpose of effecting a sale. That is the conveyancer's form of the trust for sale of freehold and copyhold estates, the difference of form being merely to avoid the necessity of a double admission to the copyholds. The trustees are to convey the copyholds to the purchaser directly in order to avoid the expense of two fines. Then there is a power to postpone the sale; and, last of all, there is this devise: "And I devise to the said Egerton Hubbard, his heirs and assigns, all real estate which at my death may be vested in me as trustee subject to the trusts affecting the same." After the date of his will, he entered into a contract of sale dated the 23d of December, 1874. It was an ordinary contract of sale. A deposit of £3,000 was paid, and requisitions on the title were sent in in the usual way; but eventually the title was finally accepted by the plaintiffs on the 1st of May, 1875. The testator, the vendor, died on the 12th of June, 1875; and, under those circumstances, the question which I have to decide is, there being a difficulty in finding the heir-at-law or customary heir of the testator, whether the trustees Hubbard and Muller, or the trustee Hubbard, takes the legal estate in the freehold and copyhold lands which have been sold.

Now, the first question to be considered is, What is the meaning of the will itself? The new Wills Act says that unless a contrary intention appears by the will, the will is to speak from the death of the testator as to the real and personal estate comprised in it. In other words, in the absence of a contrary intention, you are to read a general gift of real estate as being equivalent to "all the real estate which I shall be entitled to at the time of my death" in the same way as you always read a general gift of personal estate. In this particular instance the testator has used these very words as regards trust estates; as to them he has only given those which at the time of his death may be vested in him as trustee. It appears to me that there is nothing in this will to exempt the real estate from the operation of the statute, and it must be read as a gift of all the real estate "to which I shall be entitled at the time of my death." No one can doubt for a moment that the after-acquired real estate would have passed under those words, and would have been subject to the trusts for sale.

That being so, the next point I have to consider is, What is *the effect of the contract? It appears to me that [506 the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled be-

fore the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor, "Either pay me within a limited time, or you lose your estate," and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a court of equity; he has a right to say to the purchaser, "Either pay me the purchase-money, or lose the estate." Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the Court of Equity, or now by a judgment of the High Court of Justice; and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the court, and the vendor becomes again the owner of the estate. But that, as it appears to me, is a totally different thing from the contract being cancelled because there was some equitable ground for setting it aside. If a valid contract is cancelled for non-payment of the purchase-money after the death of the vendor, the property will still in equity be treated as having been converted into personality, because the contract was valid at his death; while in the other case there will not be conversion, because there never

507] was *in equity a valid contract. Now, what is the meaning of the term "valid contract?" "Valid contract" means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser—a contract binding on both parties. As regards real estate, however, another element of validity is required. The vendor must be

in a position to make a title according to the contract, and the contract will not be a valid contract unless he has either made out his title according to the contract or the purchaser has accepted the title, for however bad the title may be the purchaser has a right to accept it, and the moment he has accepted the title, the contract is fully binding upon the vendor. Consequently, if the title is accepted in the lifetime of the vendor, and there is no reason for setting aside the contract, then, although the purchase-money is unpaid, the contract is valid and binding; and being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity. That being so, is the vendor less a trustee because he has the rights which I have mentioned? I do not see how it is possible to say so. If anything happens to the estate between the time of sale and the time of completion of the purchase it is at the risk of the purchaser. If it is a house that is sold, and the house is burnt down, the purchaser loses the house. He must insure it himself if he wants to provide against such an accident. If it is a garden, and a river overflows its banks without any fault of the vendor, the garden will be ruined, but the loss will be the purchaser's. In the same way there is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject of course to his right to being paid the purchase-money and his right to enforce his security against the estate. With those exceptions, and his *right to rents till the day [508 for completion, he appears to me to have no other rights.

Upon this point I shall merely refer to two authorities. First, in the case of *Hadley v. London Bank of Scotland* (1), I find this passage in the judgment of Lord Justice Turner: "I have always understood the rule of the court to be that if there is a clear valid contract for sale the court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by *lis pendens*. I think this rule well founded in principle, for the property is in equity transferred to the pur-

(1) 3 D. J. & S., 63, 70.

chaser by the contract; the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him."

In *Shaw v. Foster* (') the general proposition is, I think, laid down by every one of the noble Lords who made a speech on that occasion. Lord Chelmsford says ('): "According to the well-known rule in equity, when the contract for sale was signed by the parties Sir William Foster became a trustee of the estate for Pooley, and Pooley a trustee of the purchase-money for Sir William Foster." Lord Cairns says ('): "Under these circumstances, I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a court of equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner, in the eye of a court of equity, of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property"—that interest being, as I said before, a charge or lien upon the property for the amount of the purchase-money. Lord O'Hagan says ('): 509] "By the contract of sale the *vendor, in the view of the Court of Equity, disposes of his right over the estate, and on the execution of the contract he becomes constructively a trustee for the vendee, who is thereupon on the other side bound by a trust for the payment of the purchase-money"—that is, perhaps, not quite accurate—it is not "a trust for the payment of the purchase-money," but it is a charge or lien—however, he meant the same thing—"or, as Lord Westbury has put it in *Rose v. Watson* ('), 'When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is in equity transferred by that contract.' This I take to be rudimental doctrine, although its generality is affected by considerations which to some extent distinguish the position of an unpaid vendor from that of a trustee," by which I understand him to mean "a mere trustee." He has already said

(') Law Rep., 5 H. L., 321.

(*) Law Rep., 5 H. L., 349.

(') Law Rep., 5 H. L., 338.

(*) 10 H. L. C., 678.

(*) Law Rep., 5 H. L., 338.

that he is a trustee, and he is not now distinguishing the vendor's position from that of a trustee, but distinguishing it from that of some other kinds of trustees. His Lordship continues: "Thus, as it is stated by the Master of the Rolls in *Wall v. Bright* (1), 'The vendor is not a mere trustee; he is in progress towards it'—that is, towards being a mere trustee—"and finally becomes such when the money is paid, and when he is bound to convey.'" The Lord Chancellor (Lord Hatherley) says (2): "My Lords, I should stop here, and not say a word more, were it not for what I consider to be a very singular misapprehension which occurred with reference to some expressions in my judgment, and which expressions have occasioned the infliction upon your Lordships (for which I am sure I owe the House an apology) of the citation of authorities to prove the elementary proposition that the moment that a contract for sale and purchase is entered into, and the relation of vendor and vendee is constituted, the vendor becomes a constructive trustee for the vendee. It is but a constructive trust." He uses the expression, "the vendor becomes a constructive trustee for the vendee," and then he goes on to say that he thinks, upon consideration, that he had not gone beyond the view of Sir Thomas Plumer; and he disposes of that by saying he thinks his own expressions were not different from those of Sir Thomas *Plumer. It is immaterial [510 to consider that; for he states the doctrine in perfect accordance with every one of the other noble Lords, including Lord O'Hagan, if you correct the expression of Lord O'Hagan in the manner in which I am sure he would have corrected it himself had his attention been called to it.

It must, therefore, be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into.

What, then, is there on the other side? I will, first of all, dispose of the case of *Purser v. Darby* (3). In that case Joseph Darby, being seised in fee of certain closes of land, agreed in September, 1855, to sell them to the plaintiffs. Afterwards, on the 9th of June, 1856, Joseph Darby made his will, and thereby devised all his share, right and interest in the land (that is a specific devise), of which the closes contracted to be sold formed part, to his sons, the defendants (two of whom were still infants), and their heirs, as tenants in common, subject to the payment of all debts, &c. Then there was a devise of the testator's mortgage and trust estates to two of his sons, whom he also appointed executors

(1) 1 Jac. & W., 508.

(2) Law Rep., 5 H. L., 356.

(3) 4 K. & J., 41.

of his will. He died without completing the contract, and the bill was filed for specific performance. Mr. Bernard, for the defendants, submitted that this was not a case for costs, and he said: "At the date of his will the testator was *quoad* the property he had contracted to sell a trustee for the plaintiffs, and he had taken the precaution of devising all his mortgage and trust estates." Then the Vice-Chancellor is reported to have said: "But, so far as regards the property comprised in the contract, he was merely a constructive trustee." That is the same doctrine as in all the same cases, and there would have been no difficulty if he had stopped there, but he proceeds thus: "I have held—and the decision has been since affirmed—that where there is merely a constructive, and not an express trust, a devise of trust estates does not supersede the necessity of a decree." I confess that I am unable to understand clearly what this means; nor has the learned counsel who cited it, with all his ingenuity, been able to explain it. The answer to Mr. Bernard's argument appears to me to be this, there was a specific devise of the land in question and it could 511] *not possibly, therefore, have passed under the devise of trust estate; because although the testator had no right to charge this particular property with his debts, and if the devise had been a general devise the charge of debts might have shown that, being a trust estate, it was not intended to pass, still, where you devise it specifically, it must pass at law, and you cannot get rid of the specific description of the property by saying that there is a charge upon it which the testator had no right to make. It is altogether, if I may say so, out of the authorities which I shall presently consider. Upon the whole, I think the Vice-Chancellor must mean, though I am not sure about it, that where an infant or a lunatic, that is, a person under disability, would take the estate if the contract were not established in a court of equity, there the purchaser cannot safely complete without establishing the validity of the contract by decree; and if that be the meaning, the case does not militate in the least against the other decisions.

In another case of *Thirtle v. Vaughan* ⁽¹⁾ which came before the same Vice-Chancellor there was a contract for sale, and the vendor died before the purchase was completed, having, by his will, given the residue of his real and personal property to his children equally to be divided between them as tenants in common, with a gift over if either of them died under twenty-one. The question was whether, it

(1) 2 W. R., 632.

being a general devise, the gift over showed that trust estates were not included; and Vice-Chancellor Wood said "He thought that this case was distinguishable from those cases which had decided that the fact of a general devise being to persons as tenants in common was not sufficient by itself to prevent trust estates from passing under it. Here there was the additional clause providing for accruer, and the wording of it was such that it was difficult to come to any other conclusion than that the testator was referring to beneficial interests only. He must therefore hold that the legal estate in the property did not pass by this devise, but had descended on the heir, who would be declared a trustee." That is, there being a valid contract for sale, he decided that it bound the estate, but that the words of the devise were not sufficient to pass it, because it was a trust estate, and the expressions used in the devise (it being a general devise) were *inconsistent with the notion that the [512] testator intended to dispose of estates of which he was a constructive trustee. That case of *Thirtle v. Vaughan* (*) was also followed and approved of by Vice-Chancellor Malins in *Martin v. Laverton* (†).

Now, what is the doctrine to which Vice-Chancellor Wood referred in *Thirtle v. Vaughan*? It rests upon two leading cases, which I need not do more than mention, namely, *Lord Braybrooke v. Inskip* (‡) and *Roe v. Reade* (¶), which have established this, that a general devise of real estate, like every other clause in the will, must be construed according to its ordinary meaning, that the use of the words "my real estate" (that is, the use of the word "my" prefixed to "real estate") is not of itself sufficient to show that the real estate which the testator had at law only would not pass as well as real estate to which he was entitled either beneficially or legally and beneficially. Where you get a devise of "my real estate," or "my freehold estate," or anything in the shape of a general as distinguished from a specific devise of land, where a particular parcel of land is spoken of by a particular description, there you may control the words "my real estate" by the context, and, as in other cases, restrict their meaning to real estates in which the testator has a beneficial interest by force of the context; and if you find that the context consists of restrictions and limitations which are wholly inconsistent with the notion that the testator was dealing with the trust estate either because he would have had no power so to deal with the trust

(‡) 2 W. R., 632.

(¶) 8 Ves., 417.

(†) Law Rep., 9 Eq., 563.

(§) 8 T. R., 118.

estate, or because so dealing with it it would be a breach of trust, you avail yourself of these restrictions and limitations to say that that is the context which shows that the testator, in speaking of "my real estates," did not mean "the real estates which I am entitled to at law only," but "the estates to which I am beneficially entitled." What particular words will produce this result it is immaterial now to consider. It has been said that a charge of debts and legacies is sufficient, because the testator has no power to charge the estate of which he is trustee with debts and legacies. It may be that limitations in strict settlement are sufficient, because a testator would be guilty of a gross dereliction of [513] duty if *he devised a trust estate in strict settlement. But, whatever the words may be, they are only used by the court as a reason for cutting down the primary meaning of the words "my real estate" to mean "the real estate to which I am beneficially entitled," or, as I should say, under the new Wills Act, "the real estate to which I shall be beneficially entitled at the time of my death." That being so, the question arose, in the case of *Wall v. Bright* (¹), whether the words used in that particular case were sufficient to show that the testator did intend the words "my real estate" to mean "the real estate to which I am beneficially entitled." That was the real question decided in the case of *Wall v. Bright*.

Now, the first observation to be made upon *Wall v. Bright* is this, that there was no gift of trust estates. The court was not embarrassed there by having to choose between two devises. It was not a devise of "all my real estate to A. and all my trust estate to B." If that had been the devise, another well-established rule of construction would have applied, namely, that where you find a general gift in the will followed by a particular gift which would from its nature be included in the general gift, you read the particular gift as being an exception from the general gift. A man may begin his will by saying, "I give all my personal estate to A., and I give my gold watch to B. and £100 to C." Nothing can be better established than this, that although the words "all my personal estate" would carry both the gold watch and the £100, yet, they being found as particular bequests—one specific and the other general—still, the words "all my personal estate" are to be read as "all my personal estate except what I have hereinafter given to B. and to C." The words are read as a gift of residue, and not as a gift of the entirety. If a man says, "I give all my real estate to A., and I give Blackacre to B.,"

(¹) 1 Jac. & W., 494.

no one could doubt for a moment that the gift to A. must be made consistent with the gift to B., by excepting Blackacre from the gift of all the real estate. Therefore, when we have a will which says, "I give all my real estate to A., and I give all my trust estate to B.," you except the trust estate on the same principle as you except Blackacre from the gift of the real estate; and therefore it must be read as a gift of "all my real estate except the *trust estate [514 to A.," and a gift "of my trust estate to B.;" and in that way you make the whole will consistent. Consequently, if, in *Wall v. Bright* (1), we had had a gift of "all my real estate to A.," followed by a gift "of my trust estate to B.," I can see no doubt that the estate in question (assuming it to be, as I think it was, a trust estate) ought to have been held to pass under the second gift, and not under the first gift. But in *Wall v. Bright* there was only a single gift, and therefore the words "all my real estate" could not be cut down by reason of there being a subsequent gift of part of the real estate, and they were therefore to have their primary signification, unless you could find in the trusts something which was repugnant to the idea that the testator was dealing with an estate which he contracted to sell.

I shall now first of all consider the will which was the subject of decision in *Wall v. Bright*, and give my reasons for thinking that the decision was correct, and then I am afraid I must consider the reasons given by the learned judge who gave that decision, and say how far I can follow them. The will in *Wall v. Bright* was made after the date of the contract. It does not appear whether or not the title was accepted, but from the time which had elapsed and what had taken place, I think it is most likely that the title was accepted in the testator's lifetime; but it is treated in the judgment as not being accepted at the date of the will. Whether this was so or not does not appear from the report or from the record, which I have sent for. The gift was a gift by the testator of all and every his freehold and all other his real and leasehold messuages or tenements, farms, lands, and hereditaments whatsoever and wheresoever, and whether held for lives, terms of years, or otherwise, and also all his goods and chattels, and personal estates, and effects of every nature and description, to trustees, upon trust, as soon as conveniently might be after his decease, to sell and dispose of all and singular his said freehold and other real and leasehold messuages, &c., and all his personal estate of every description, and to receive the purchase-

(1) 1 Jac. & W., 494.

money and to invest it in certain stocks and funds, which were to be held upon certain trusts. Now why, under such a gift, should not the legal estate pass? If there was a valid 515] contract for sale, either because the *title was good, or if bad had been accepted, the testator would have become a constructive trustee for the purchaser, but a constructive trustee with possession (for it appears that the purchaser had not been let into possession of the whole), with a right to retain that possession until the purchase-money was paid, with a lien or charge upon the estate for the purchase-money, and a right to make that lien effectual by a suit in equity if he thought fit. In other words, the testator was possessed of personal estate with a charge upon the real estate to secure the payment of the sum due to him as part of his personal estate. If, on the other hand, the title, being bad and not having been accepted, was in such a state at the time of his death that the purchaser was entitled to refuse the estate, then there was not a valid contract to sell; there was nothing which would have been binding upon the testator's heir, under the doctrine of constructive conversion; and then the testator would have been entitled to the real estate, to the freehold estate free from any contract at all, because the contract he had entered into was not binding.

Those are the two possible views of the position at the time the testator made his will, and at the time of his death. It seems to me that, taking either view to be correct, there is nothing in these trusts inconsistent with the notion that you are to give to the words "my real and personal estate" their full meaning. If he, were entitled simply to the real estate as a security for the payment of the purchase-money, there is a trust for the trustees to get in and to sell and dispose of his personal estate, a trust which they can only carry out by having the legal estate to convey to the purchaser. They cannot get in the personal estate given to them, except by having the legal estate, and therefore there is a reason why he should give them the legal estate. Not only so, but under the words of the will they might actually put up for sale and have sold the charge, and upon payment by the purchaser they would have conveyed the legal estate in the property to him in order to secure the lien. There is nothing, therefore, in this view of the case which would lead you to say that the terms of the gift were inconsistent with an estate contracted to be sold by the vendor being intended to pass. On the other hand, if the contract were invalid, 516] of course he had a right to devise it as part of *his real estate upon trust for sale. Therefore, looking at the

will as it stands, it does appear to me, taking either alternative, that there was not any repugnancy in the trust, nothing to cut down the proper meaning of the words in a gift of real and personal estate.

While on this branch of the subject I may advert to those numerous decisions on mortgage estates in which it has been held that the legal estate in a mortgage passed by a gift of mortgages or a gift of securities for money to persons who were to take the mortgage money in order to enable them to receive the money which it was part of their duty to receive. Therefore, if the decision had stood alone without more, I could have seen ample ground for holding that in the particular case which the court had to deal with in *Wall v. Bright* ⁽¹⁾ there was no difficulty in saying that full effect was to be given to the ordinary meaning of the words. I must say, however, I am not quite entitled to deal with the case in this way. In the first place, I feel bound to observe that the case was not very carefully decided. It appears by the report and by the record (which I have examined), and it was stated in the argument, that one of the fields, one of the two comprised in the second agreement, had been fully paid for. Upon looking at the agreement, which is properly stated in the report, it appears that these two fields were two separate purchases although they were in one contract—they were separately sold for separate sums, and were distinct purchases. Consequently, as regards one of these fields, there had been full payment, and the testator was a mere trustee. That point seems to have escaped notice by the judge, for I see that the decree is general, and includes the whole of the property.

The next observation is, that although Sir Thomas Plumer says in one part of his judgment that the vendor is a constructive trustee, yet in other parts he seems to consider he is not quite a trustee. He says ⁽²⁾: "Now, though there is a great analogy in the reasoning, with respect to the will of a naked trustee and that of a constructive trustee, on the ground of the impropriety of their attempting to dispose of the estate, yet for many purposes they stand in different situations. A mere trustee is a person who not only has no beneficial ownership in the property, but never had any, and could, therefore, never have contemplated a disposition of it *as of his own.*" That is not quite [517 accurate. A man may have once been owner and become trustee; he may settle his own estate for value by declaring himself a trustee, and he may thus become a trustee

⁽¹⁾ 1 Jac. & W., 494.

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⁽²⁾ 1 Jac. & W., 501.

although he was once the owner ; so that it is not quite right to say the question depends upon his being owner once. Then the judgment goes on to say : " In that respect he does not resemble one who has agreed to sell an estate, that up to the time of the contract was his. There is this difference at the outset, that the one never had more than the legal estate, while the other was at one time both the legal and beneficial owner, and may again become the beneficial owner, if anything should happen to prevent the execution of the contract ; and in the interim, between the contract and conveyance, it is possible that much may happen to prevent it. Before it is known whether the agreement will be performed, he is not even in the situation of a constructive trustee ; he is only a trustee *sub modo*, and provided nothing happens to prevent it, it may turn out that the title is not good, or the purchaser may be unable to pay." Now, as regards the first of these alternatives, the law is correctly laid down. If the title is not good there is no valid agreement, and the whole doctrine assumes that there is a valid contract. But as regards the other, I must say that the law is now settled otherwise, and, as I think and have said before, it was so settled before the time of Lord Hardwicke. The fact of the purchaser being able to pay or not able to pay is immaterial ; if there is a valid contract, the conversion is effected. All the cases as to conversion turn upon this, whether, at the time of the death, there was a valid contract ; and you never go on to inquire whether the purchaser is solvent or insolvent—whether he is able to pay or not able to pay. If the purchaser proves unable to pay, you may get back the estate in equity ; but the contract is binding, and makes conversion. Therefore that must be thrown out of consideration. Then the judgment goes on to say : " The agreement is not for all purposes considered to be completed." That is so. " Thus the purchaser is not entitled to possession, unless stipulated for ; and if he should take possession it would be a waiver of any objections to the title : the vendor has a right to retain the estate in the meantime, liable to account if the purchase is completed, 518] but not otherwise. Till *then it is uncertain whether he may not again become sole owner : the ownership of the purchaser is inchoate and imperfect ; it is in the way to pass, but it has not yet passed." I cannot treat that as law. The ownership has passed the moment the contract is made, if valid. If the learned judge means to include the case of a bad title which the purchaser refuses, then I say

that in that case there is no contract for the purpose we are now considering. Every contract for the sale of real estate is made under an implied condition that the vendor is entitled to sell the estate; if he is so entitled, then by the contract the equitable ownership passes subject to a charge for the purchase-money; but it may be destroyed by proceedings in equity by the owner of the charge. Then he goes on to say: "While a suit for a specific performance is pending, nice questions may arise, and it is settled that the vendor may complete the title while under investigation in the Master's office. The purchaser is not bound till the title is made out, and suppose the will to be made in the interim. Then there is a contract to sell, which the other party has refused to adhere to; the title is doubtful, and it is uncertain whether it can be completed. Is he not then, if making his will in that state of things, to make a disposition of the estate?" That, I think, is the key to the argument. What he means is this: The vendor does not know yet whether he can make a title or not; there is, therefore, at least one alternative in which he may dispose of the estate, namely, in the case of the title not being made out, so that the contract is avoided. Then he goes on to say: "If the court were to decide that the legal estate did not pass to the trustees, the consequence would be, that the defendant would be exonerated from his contract, and it will then become necessary either to decide that it did pass, or else to say that it descended beneficially to the heir-at-law." That is not so. The law is correctly stated by Vice-Chancellor Wood, in the case I have cited, to the effect that the contract binds the heir-at-law; he does not take beneficially; he is a mere trustee for the next of kin. It is quite true at this time you could not get a conveyance from the heir-at-law if he was under disability, and therefore you could not force the purchaser to complete, because he was entitled to have the legal estate; but although the purchaser got off completing the *contract, the heir- [519] at-law did not take beneficially. Nevertheless it seems to me that this idea that the heir-at-law could take beneficially was the moving consideration with Sir Thomas Plumer to make the estate pass. Then he goes on to say: "The vendor is, therefore, not a mere trustee, he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains, for certain purposes, his old dominion over

the estate. There are these essential distinctions between a mere trustee, and one who is made a trustee constructively, by having entered into a contract to sell; and it would, therefore, be going too far to say that they are alike in all respects; the principle that the agreement is to be considered as performed, which is a fiction of equity, must not be pursued to all its practical consequences. It is sufficient to say that it governs the equitable estate, without affecting the legal. Then, under all these circumstances of dissimilitude, are we to extend the principle that has been established as to mere trustees, to one who is partly the owner, who has the legal, and partly the beneficial estate?” “This case, I think, is very different from those, and does not fall within the principle which they afford. The will of a trustee, giving the trust estate for his own purposes, never can be right, that of this testator might. In this case, if the contract fails, there is a beneficial ownership, that is left undisposed of if the will is not to have effect. If the contract is performed, no injury arises from this construction; the only effect is that the trustees convey instead of the heir; but if it be not performed, a positive injustice is done by the other, for the estate goes to the heir, contrary to the intent of the testator. The safest way is to hold that the estate passes, adhering to the words, there not being enough to take it out of them.” So that he really ends by saying that it is an example of the doctrine that the words would pass all the real estate, as they undoubtedly would, and there is not enough in the trust to lead to a contrary conclusion. He then says: “The present is a strong instance of the propriety of this construction, for the testator has in substance done no more than would have been proper if 520] he had contemplated the consequences. He *intended that all his real estate should be converted into money; then if the contract is completed, it supersedes the necessity of another sale; if not, the trustees are to sell. To give to the trustees the legal estate, is not inconsistent with this intention, on the contrary, it is just what he ought to have done to enable them to convey to the purchaser. They are to dispose of the legal estate in the manner directed by the will, except that it differs by being in pursuance of a prior instead of a future sale.” There the judgment ends.

I think it is impossible to give effect to all those reasons, and that some of them must be considered as not quite accurate in law. It is quite possible to support the decision on the grounds I have stated, and it is quite possible to support it even on less special grounds. It may well be that

where there is no devise of trust estate, but a mere devise of real estate upon trust to sell, with a gift of the personal estate to the same persons to get in, you ought to hold that the real estate passes, because *quacunque via*, those persons would get the purchase-money, and therefore they ought to have the means of obtaining it. There is still another ground, as to which I must now refrain from giving an opinion, but upon which it is also possible to support the decision. It might be said that where there is a devise of "my real estate" upon trust to sell and take the purchase-money, and the proceeds of sale and the personal estate are beneficially given to the same persons, that in such a case it is given for the purpose of completing the sale already made. You cannot so treat it where the real and personal estate are not given to the same persons beneficially, because the estate contracted to be sold has been converted into personalty by the contract, and would go in a different way from the real estate directed by the will to be sold. A striking example of this is the case of *Lawes v. Bennett* ⁽¹⁾. There an option of purchase reserved by a lease was exercised after the death of the lessor; and it was held that the option took effect from the date of the lease, so that the property had been converted in his lifetime from real estate into personal estate; and that the persons who took the personal estate under the lessor's will had become entitled to the purchase-money, and not the devisee of the real estate.

*I think I ought also to refer to the case of *Whittaker v. Whittaker* ⁽²⁾ as to the effect of the annulment of the contract for sale by reason of the incapacity of the purchaser to pay. In that case it was held that the cancelling of the contract by the decree of the Court of Equity after the death of the purchaser, by reason of his executors not then having funds available to complete the contract, did not affect the rights of the persons who took beneficially under the will of the purchaser; in other words, that it did not reconvert the estate, but effected a cancellation of the contract from the date of the decree, and was not a rescission of the contract *ab initio*, which of course would prevent conversion.

I now come again to the will before me. First of all, there is a charge of "such part of my real estate as consists of my messuage, farm, and lands at Arlsey aforesaid, called the Bury Farm, in exoneration of my personal estate with the payment of my debts, and of the pecuniary legacies aforesaid;" and, subject to the trust hereinafter contained for sale of the same hereditaments, he directs the debts and legacies

⁽¹⁾ 1 Cox, 167.

⁽²⁾ 4 Bro. C. C., 31.

to be received under the statutory power; and then there is a general devise of all the real estate.

The first question is, Is there a specific devise of Bury Farm? It is a question of some difficulty, but I think there is not. He had sold Bury Farm, he had not got Bury Farm at the date of his death; if he had not Bury Farm at the time of his death, beyond all question he could not charge it. The object of referring to Bury Farm is to charge it. It is stated to be part of his real estate, and it was at the date of his will really part of his real estate. When he says, "subject to the trust hereinafter contained," he means subject to the trust affecting my real estate, so far that real estate includes Bury Farm, but if Bury Farm is dropped out of the charge of debts (as it was, because the will is to take effect from the time of his death), why am I to say that that which was a mere clause to show that the general gift of his real estate was not to be done away with by the specific charge of Bury Farm—that is, that Bury Farm was still to be subject, as all his other real estate, to the trusts of his will—why am I to hold that such a clause is to prevent it dropping out of a gift of "my real estate"? I think the will must be 522] read and interpreted *by the Wills Act, and that the gift of "my real estate" is a gift of "the real estate which I shall be entitled to at the time of my death." Then we have that followed by a devise to Mr. Hubbard of "all real estate which at my death may be vested in me as trustee." Therefore this testator actually contemplated that something might happen between the date of his will and his death, and even without the Wills Act you might well have read it as providing that "if by any reason that which is vested in me as absolute owner of my real estate shall become vested in me as a trustee, that shall go to somebody else." That is perfectly consistent, and consequently if this estate was vested in him (as I hold it was) as trustee at the time of his death, it appears to me that it must pass to Hubbard as sole devisee.

Therefore, in my opinion, there is a good title, and the concurrence of the heir-at-law or customary heir is not necessary to give a complete title to and a conveyance of the estate comprised in the contract with the plaintiffs.

Solicitors: *Whites, Renard & Co.*, agents for Henry Brittan, Press & Inskip, Bristol; *Freshfields & Williams*.

See 9 Eng. Rep., 743 note; Matter of Mary Smith, 11 Eng. Rep., 444.

An executory agreement to convey an estate in lands, upon payments there-

after to be made, does not give to the vendee any interest in such lands: Millard v. McMullen, 5 Hun., 572.

Where A. makes a contract with B.

and C. for the sale to them of certain real estate, and dies before the deed is to be executed, and on the day the deed is to be delivered the heir at law and the widow refuse to join in executing a conveyance, a decree will not be made to compel specific performance by the purchasers on a bill filed by the administrator of A. for the benefit of the widow (creditors not being interested in the litigation) after the land has depreciated in value: *Reddish v. Miller*, 27 New Jersey Eq., 514, reversing 25 id., 354.

The following propositions in the Court of Chancery were not, however, overruled:

1. An administrator is, *ordinarily*, entitled to enforce specific performance of a contract made with his intestate for the purchase of real estate.

2. A contract for the sale of real estate works an equitable conversion of the land into personalty from the time when it was made, and the purchase-money becomes, thereupon, a part of the vendor's personal estate, and, as such, distributable upon his death to his widow and next of kin.

3. In equity, on the execution of a contract for the sale of real estate, the vendee becomes trustee of the property for the purchaser, and upon his death, intestate, his heir-at-law becomes such trustee in his stead. Judgments against the heir-at-law are not liens upon the property: *Miller v. Miller*, 25 N. J. Eq., 354, 365-6.

As to the last point, see *Smith v. Gage*, 41 Barb., 60; *Adams v. Harris*, 47 Miss., 144.

A mere order for the sale of lands of an infant, by his guardian, does not prevent the lien of a judgment against the infant from attaching on the land ordered to be sold. The purchaser's title does not relate back to the time of the making of the order. The lands of an infant may be sold on execution against him: *Shaffner v. Briggs*, 36 Ind., 55.

An action to foreclose a lien for the purchase-money under a contract for the sale of land, cannot be maintained by the representatives of a deceased vendor, where it is not alleged and shown that they have tendered, or are willing, ready and able to give a deed: at least, unless the person taking the

legal title to the premises, either as heir or devisee, is made a party so as to be bound by the judgment: *Thompson v. Smith*, 63 N. Y., 301.

See *Freeseon v. Bissell*, 63 N. Y., 168.

Where an unmarried man makes a contract to sell real estate, and to execute a deed on payment of the purchase-money, and afterwards marries and dies before executing a deed, the right of dower of the widow depends upon the compliance by the purchaser with the terms of the contract.

If the purchaser in such case pays for the land, he is entitled to a conveyance free of the claim of dower, and he may proceed against the heirs and legal representatives and compel a conveyance.

If he fail to comply, the representatives may proceed to compel a specific performance, or for a rescission of the contract. If it be rescinded, the widow will be entitled to dower. The purchaser cannot enjoin the widow's application for admeasurement of dower without showing that he is entitled to a conveyance, and for the purpose of procuring an injunction and compelling a conveyance the heirs and legal representatives are necessary parties: *Rain v. Roper*, 15 Florida, 121.

See also *Kentbrough v. Curtis*, 50 Miss., 117.

A vendor of a piece of land gave to the vendee a title bond, and received in return one-half the purchase-money in cash down, and the other half in two promissory notes. Afterward the vendee died, leaving a widow and four children. An administrator was duly appointed. Subsequently, by certain condemnation proceedings, a railroad company obtained a right of way for its road across said land, and paid the damages assessed to the county treasurer. Afterward the vendor assigned the notes to the plaintiff, and also executed deeds to the widow and children according to their respective rights under the law of descent, precisely in accordance with the said bond, except that he did not covenant against the use of said right of way by said railroad company, and delivered said deed to the plaintiff, to be by him delivered to the proper parties when said notes were paid. Said deeds were duly tendered, and payment of said notes duly

demand and refused. The plaintiff then commenced this action against the administrator, widow, children, and treasurer, asking judgment against the administrator for the amount of the notes and interest, and against all the defendants that the land and amount of money in the hands of the treasurer should be subject to the payment of the judgment: Held, that the action could be maintained: *Kuhn v. Freeman*, 15 Kansas, 423.

The personal estate of an infant converted into realty, upon bill filed for the purpose, by decree which omits a direction that the realty shall be held in the same manner and subject to the same rules of descent and distribution as the personalty, will nevertheless, upon the death of the infant under age, descend as personalty, and the fact that the conversion was made at the instance of the mother, as the next friend of the infant, will not prejudice her right to have it so distributed: *Paul v. York*, 1 Tenn. Chy., 547, reviewing many cases.

Money paid into court, the proceeds of real property sold by direction of the court, and with the consent of the owner, a married woman, is to be considered personalty as between her heirs at law and personal representatives, provided such owner be an adult, and of sound and disposing mind: *Denham v. Cornell*, 7 Hun, 662.

A testator authorized his executor to sell his personal and real estate, and after giving some legacies, directed the residue to be invested, and the interest paid annually to his wife during widowhood; on her death or marriage the principal was to go over. She elected to take against the will: Held, 1. That she took one-half of the real estate as land during life. 2. By her election, the intestate laws superseded the will as to her, and excluded the power of conversion under the will, so far as it affected her estate. 3. The executor under the power could sell the real estate, but the purchaser would take it subject to the widow's statutory dower. 4. Having declined to accept under the will, as to her there was no will, and she could not claim her share of the proceeds of a sale by the executor, absolutely as personalty: *Hoover v. Landis*, 76 Penn. St. R. 354.

Where one dies seized of real estate incumbered by a mortgage, which is thereafter foreclosed and the land sold, any surplus arising on the sale is to be regarded as realty, and goes to the heirs or devisees, not to an administrator. An administrator, as such, cannot maintain an action to recover the same. This is so, although the mortgage provides that the surplus shall be paid to the mortgagor, his executors or administrators: *Dunning v. Ocean*, etc., 61 N. Y., 497, affirming 6 Lans., 296, and disapproving *Varnum v. Meserve*, 8 Allen (Mass.), 158, 160.

The will of H. directed his executors to close his business and place the proceeds thereof, and all his "property, both real and personal, at interest on bond and mortgage, or otherwise, as in their judgment they may deem best," and to employ "the proceeds, *rents*, income or interest" for the support and maintenance of the testator's wife and children; he then devised and bequeathed all his estate, "both real and personal," to his children, to be divided upon the death of his wife. In an action for a construction of the will, held, that an intent to convert absolutely the real estate into money did not appear, and no such conversion was made by the will.

It appeared that the personal estate of the testator was amply sufficient to provide for the support and maintenance of the testator's widow and children. The real estate was not disposed of by the executors: Held, that as no necessity existed for a sale of the realty for the purposes specified in the will, to this extent the purpose had failed; and that the land retained its original character and descended to the heirs: *Gourley v. Campbell*, 66 N. Y., 169, reversing 6 Hun, 218.

See *Bristol v. Austin*, 40 Conn., 433, cited addenda, 9 Eng. R., VIII; also, *Mandelbaum v. McDonell*, 29 Mich., 78, an interesting and well considered case, involving also a consideration of the question as to the right of the testator to suspend all power of alienation of a vested estate in fee for a reasonable time, considering also and reviewing *Largis' Case*, 2 Leonard, 82; 3 id., 182; *Dunning v. Ocean*, etc., 61 N. Y., 497.

A special act authorized a commission to issue to inquire into the lunacy of

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one P. V.: and if he should be found a lunatic, the act directed a committee of his estate to be appointed, and authorized such committee to sell his goods and lands; and to invest the proceeds in bank stock or real securities; and enacted that whatever remained of

such investments at the lunatic's death should be distributed among his legal representatives according to law: Held, that such residue was personal estate, and was to be distributed among the next of kin: *Clarke v. Ruttan*, 11 Grant's (U.C.) Chy., 416.

[2 Chancery Division, 531.]

M.R., April 29; May 6, 1876.

***In re PERCY AND KELLY NICKEL, COBALT AND [531
CHROME IRON MINING COMPANY.**

Company—Winding-up Petition—Opposition by Foreign Shareholders—Security for Costs.

A shareholder of a company who resides out of the jurisdiction and appears to oppose a petition for winding up the company cannot be required to give security for costs.

THIS was a creditors' petition for winding up the Percy and Kelly Nickel, Cobalt and Chrome Iron Mining Company, Limited. The petition was opposed by certain shareholders of the company residing in Paris, who filed affidavits in opposition to the application, and also applied to have the petitioner cross-examined.

The petition was opened on the 29th of April, and the cross-examination of the petitioner was commenced, when the further hearing was adjourned for a week in order that the books of the company might be produced. Upon the petition again coming on,

Ince, Q.C. (*Terrell* with him), for the petitioner, asked that the opposing shareholders might give security for costs, urging that they might put the petitioner to great expense, which he would be unable to recover from them or from the company, which was insolvent. He referred to the Rules of Court, February, 1876, rule 7.

Roxburgh, Q.C. (*Grosvenor Woods* with him), for the shareholders, objected that the application was too late.

Chitty, Q.C., *Phear* and *Palmer*, for other respondents. JESSEL, M.R.: This application is entirely unfounded.

The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the court compelled to give security for costs. That is a perfectly well-established and a perfectly reasonable principle; *but it does not [532 apply to a defendant or respondent who is brought here to defend himself. If the person who institutes proceedings

chooses to bring here people out of the jurisdiction, he must, in the first instance, consider whether or not it is worth his while to do so, even if he does not get costs. He must take upon himself the risk of being unable to recover his costs, and cannot be allowed to say that the defendant whom he has chosen to bring here is not to defend himself.

Nor does it make any difference if, as is the case here, the party who appears is not named as a respondent or served. The petitioner who presents a petition of this kind knows that by the act of Parliament any shareholder may appear to oppose it; he knows that there may be shareholders out of the jurisdiction, and, as I said before, he must take all that into account before he presents his petition.

It is said that the respondent may put the petitioner to great expense, and not be able to pay; but that is a remark which applies to every defendant or respondent named as well as unnamed.

No authority is produced in favor of this application: indeed I feel sure no one ever heard of such an application before. But such authority as there is is quite the other way. I have before me the case of *Cochrane v. Fearon* (¹), in which a defendant out of the jurisdiction presented a petition, and security for costs was asked for and was refused. That case was decided by Vice-Chancellor Kindersley, and shows that a defendant who is brought before the court has a right to take any proceeding to defend himself without being called on to give security for costs.

That is my view of the law; but even if it had been different, I should have been compelled to say that the application is too late. The cross-examination of the petitioner was commenced a week ago, and the litigation having been allowed to proceed, the petitioner cannot now compel the respondents to give security.

Solicitors: *T. K. Edwards & Son; G. S. & H. Brandon; Wyatt & Barraud; Barnard & Co.*

(¹) 18 Jur., 568.

[2 Chancery Division, 533.]

V.C.M., Feb. 28, 1876.

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*CROSSLEY v. TOMEY.

[1875 C. 247.]

Exceptions to Answer—Infringement of Patent—Insufficiency—Particulars of prior User.

In a suit to restrain the infringement of a patent the defendant was required to state whether he was not making articles in all respects identical with those of the

plaintiff, and to set forth in what respects they differed and by what process they were made:

Held, that the defendant, who alleged prior user by himself and others, had sufficiently answered by stating that, save so far as the articles manufactured by him before the date of the patent were similar to those of the plaintiff, the articles he now made differed from those made by the plaintiff, but he could not show in what they differed without ocular demonstration:

Held, also, that the defendant was bound, in alleging prior user by other persons, to set forth the names of some of those persons.

THIS bill was filed on the 30th of July, 1875, for an injunction to restrain the infringement of a patent granted to the plaintiffs for improvements in water-gauges. The patent was dated the 1st of December, 1874, and the specification, which was filed on the 29th of May, 1875, described the invention as relating to improvements in that class of water-gauge in which the level of the water is seen through a glass tube, or in a chamber having a glass front. The object of the invention was to overcome the difficulty experienced in seeing the water in the glass tube, by means of the application of white or colored enamel or other reflecting means to the back of the tube or chamber. This was effected by painting or otherwise covering the outside of the tube to the required width with enamel glass powder and fusing the same thereon by the application of heat, or by embedding a layer of enamel glass of the required width in the body of the glass forming the tube. By this means the light is powerfully reflected through the water, whereby the level thereof is rendered more readily visible.

The plaintiffs alleged that in July, 1875, they first discovered that the defendant, who was a glassblower at Aston, near Birmingham, was making and vending water-gauges in all material respects identical with the water-gauges so patented by the plaintiffs.

*The case now came on upon exceptions to the [534 answer.

The 6th interrogatory was in the following words:—

“Is it not the fact that in the month of July, 1875, or at some other and what time the plaintiffs, and whether or not for the first time or in fact discovered, and whether or not, as the fact was that the defendant, and whether or not who is a glassblower, and whether or not residing at Aston, near Birmingham, or at some other and what place, was, and whether or not without any license or permission from the plaintiffs or either of them, making, and whether or not vending, water-gauges, and whether or not in all material respects identical with the water-gauges so patented by the plaintiffs as in plaintiff's bill mentioned? Let the defendant

set forth in what particulars the water-gauges made and whether or not sold by the defendant differ from the water-gauges described in plaintiffs' said specification, and when first and under what title and by what method or process the defendant manufactured and whether or not still or when last manufactured the same."

The 11th interrogatory was in the following words:—

"Is it not the fact that, except in respect of the wrongful acts of the defendant in the plaintiffs' bill complained of, the said invention has never so far as the plaintiffs know or believe or in fact been used or practised by any person or persons other than the plaintiffs, or how does the defendant make out the contrary, and let the defendant set forth the names and addresses of the persons by whom, and the dates when, and the places where the plaintiffs' said invention has been used or practised?"

The defendant denied the validity of the patent, and in answer to the 6th interrogatory he said: "For upwards of fifteen years prior to the date of the letters patent granted to the plaintiffs glass tubes enamelled and treated in a manner precisely similar to the tubes intended to be used as water-gauges have been used by myself and by the plaintiffs and other glass tube manufacturers in the manufacture of barometers and thermometers. Early in the year 1873 I myself, with the view of rendering the height of the column of water in a water-gauge readily visible, applied to several 535] water-gauges which I made the same mode of *treatment in all substantial and material respects as that described or suggested in the specification of the plaintiffs' alleged invention;" and he further said: "I make and sell divers kinds of water-gauges which, save-so far as the method or process adopted by me in 1873 as hereinbefore mentioned is similar to that described or suggested in plaintiffs' specification of their alleged invention, differ from the water-gauges described in plaintiffs' said specification, but it is impossible, without ocular demonstration, to show in what particulars the water-gauges made and sold by me differ from the water-gauges described in plaintiffs' specification, and save as herein appears it is not necessary, as I submit, for me to show when first or under what title or by what method or process I manufactured and still manufacture or last manufactured the same in all material respects identical with the water-gauges alleged to be patented by the plaintiffs."

The answer to the 11th interrogatory was as follows: "I

do not know and cannot say of my belief or otherwise whether or not it is the fact that except in respect of my acts in the plaintiffs' bill complained of (which acts, however, I altogether deny to be or have been wrongful) the said alleged invention has never so far as the plaintiffs know or believe been used or practised by any other person or persons, and I submit the plaintiffs are not entitled to require at this stage of the suit the names and addresses of any persons by whom and the dates when and the places where the plaintiffs' said alleged invention has been used or practised by any other person or persons other than the plaintiffs. Such user by other persons, so far as the same was prior to the date of the said letters patent, will at the proper stage of the suit form part of my defence to the plaintiffs' bill, and it is, I submit, immaterial to any relief which the plaintiffs might be entitled to against me, assuming they establish the validity of their patent, whether or not any person or persons other than myself have or has in fact used or practised the said invention since the date of the letters patent."

Higgins, Q.C., and Millar, for the plaintiffs, in support of the exceptions: Our 6th interrogatory requires the defendant to state whether *he is manufacturing and [536 selling water-gauges in all material respects identical with those patented by the plaintiffs, and we require him to state in what particulars the water-gauges sold by him differ from those described in the plaintiffs' specification, and by what process he manufactures them. This interrogatory is not answered, for the defendant does not state distinctly in his answer whether he is now making water-gauges similar to ours, and he does not state in what particulars they differ from the water-gauges described in the plaintiff's specification. He carefully avoids the answer which he is bound to give us. He does not give us the discovery as to the facts stated in the interrogatory. We are entitled to know on the earliest occasion whether the defendant is making the same articles as those made by the plaintiff. We are entitled to this distinct answer: "If your patent is a good patent, I deny that I have infringed it." The exceptions are based upon the 41st section of the act 15 & 16 Vict. c. 83, which says that the defendant must deliver particulars of any objection on which he means to rely at the trial in support of his defence. The policy of the act is that the plaintiff should know on the first occasion on what the defendant relies, in order that if he thinks fit he may dismiss his bill, and not continue a useless litigation.

The next exception is covered by the decision in *Finnegan v. James* ⁽¹⁾. We ask whether it is not the fact that our invention has never, so far as the plaintiffs know, been used or practised by any other persons, and we require the defendant to set forth the names and addresses of the persons by whom the plaintiff's invention has been used. The answer to this is a refusal to tell us the names, although he has said previously that our invention has been used by many other glass tube makers. The Master of the Rolls, in *Finnegan v. James* ⁽¹⁾, decided that a defendant is bound to set forth in his answer the particulars of any prior user, and the particulars there required were the names and addresses of the persons by whom the plaintiff's invention had been used.

Glasse, Q.C.; and *Fooks*, jun., for the defendant: The act of 15 & 16 Vict. c. 83, gives no such right as that which is claimed by the plaintiff. The defendant may, if he thinks 537] fit, *give the information required, and the penalty for not doing so is that he is not allowed to give any evidence which is not contained in the particulars delivered: *Higginson v. Blockley* ⁽²⁾; *Bovill v. Goodier* ⁽³⁾. The defendant says that similar articles to those patented by the plaintiff have been used for many years, but he cannot state the particulars of the difference, if any, without ocular demonstration. We submit that that is a sufficient answer.

As to the 2d interrogatory, we submit that it is sufficient for the defendant to answer, as he has done, that other persons have made similar articles, but it is impossible for him to search out the names and addresses of those persons. This is not the stage of the suit in which such information need be given. It is sufficient for the plaintiff to know that there may be other persons brought forward at the hearing to give evidence of this fact. The case of *Bovill v. Smith* ⁽⁴⁾ decides that a plaintiff is not entitled to discovery from the defendant in answer to a general interrogatory as to the instances of prior user, and the Master of the Rolls, in *Finnegan v. James* ⁽¹⁾, said he would not tie the defendant so strictly as to give every instance of prior user. The defendant would be placed at a disadvantage if he were not allowed to give evidence at the hearing of other instances than those he might at the first moment be able to discover.

Higgins, in reply: In *Higginson v. Blockley* there was one question among several which was not answered, but here it is impossible to say that any part of the interrogatory

⁽¹⁾ Law Rep., 19 Eq. 72.

⁽²⁾ 4 W. R., 60.

⁽³⁾ Law Rep., 1 Eq. 85.

⁽⁴⁾ Law Rep., 2 Eq., 459.

is distinctly answered. The intention has evidently been to answer evasively, so that at the hearing the defendant may say his articles are different from ours, or he may say they are the same, according as he finds it most convenient. He does not say he sold these things, but only made them. At the hearing he may say that he has always made the same articles, and he wants at the same time to be able to say that although similar in some respects they are different in others. We are entitled to a distinct answer to each question, in order that we may know what the defence is, and that, if we find there is a *substantial answer to our [538 bill, we may avoid further litigation by dismissing it.

MALINS, V.C.: This bill was filed in July, 1875, to restrain the infringement of a patent, which was granted on the 1st of December, 1874, the specification being filed in May, 1875.

I agree with what the Master of the Rolls said in *Finnegan v. James* (1) that the practice at law and in equity ought to be assimilated as closely as circumstances would admit. The 41st section of the act 15 & 16 Vict. c. 83, requires the plaintiff at law to deliver with his declaration particulars of the breaches complained of, and the defendant is required to deliver with his pleas particulars of the objections relied on. The defence set up to this bill is, that the alleged invention is not a novelty. It is, in fact, this, that for upwards of fifteen years prior to the date of the patent, glass tubes enamelled and treated in a manner precisely similar to the tubes intended to be used as water-gauges, as in the specification mentioned, had been used both by the defendant himself, by the plaintiff, and other glass tube manufacturers in the manufacture of barometers and thermometers.

Now, if the defendant is right in that, it is only applying water to the tubes instead of spirit, or quicksilver, or other materials used for barometers and thermometers. Then he goes on to say, "Early in the year 1873, I myself, with the view of rendering the height of the column of water in a water-gauge readily visible, applied to several water-gauges which I made the same mode of treatment in all substantial and material respects as that described or suggested in the specification of the plaintiffs' alleged invention."

The plaintiffs contend that the first interrogatory is not sufficiently answered, and the case of *Higginson v. Blockley* (2) has been referred to, in which five questions were asked in one interrogatory, and only four were answered,

(1) Law Rep., 19 Eq., 72.

(2) 4 W. R., 60.

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Crossley v. Tomey.

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but here the complaint is that the answer is so mixed up that no part of the interrogatory is distinctly answered. That is a purely technical objection, but I cannot help thinking that the first interrogatory is sufficiently answered. The answer is, "I cannot show in what manner the two articles differ without ocular demonstration." In other words, he says, "I cannot answer more particularly than I have done," and that is a good answer. Therefore, I think, as the defendant has set up that defence, the plaintiff has got all the discovery he is entitled to, because he can apply for production on these grounds, and that can be followed by inspection.

The second exception proceeds on different grounds, it is this: [His Lordship read the second objection and the answer to it.] In order to show that that is sufficient Mr. Glasse appealed to the decision in *Bovill v. Smith* ⁽¹⁾, but it seems that in that case the act of 15 & 16 Vict. c. 89, was not particularly referred to, though it was referred to in *Finnegan v. James* ⁽²⁾. There it was argued that the defendants would be placed at great disadvantage if they were required to furnish the particulars asked for at that stage of the suit, for they would not be able to adduce at the hearing any other instances of prior user, and the Master of the Rolls thereupon said ⁽³⁾, "I should not tie the defendants so strictly as that; but if they set up any other instances of prior user, I should expect them to show that they discovered them after the answer was put in, and also that they gave proper notice to the plaintiff of their intention to use them at the hearing." That observation shows that his view was that if they set up prior user they were bound to set out the names of some two or three, at least, of the persons who had used them. Therefore, I think the fair result of the decision of the Master of the Rolls is, that the names of persons who are alleged to have used the similar articles should be set out. That course would have the effect intended by the act, which is, that the plaintiff may as early as possible know what defence he has to meet, and may be able to find out whether in fact his alleged invention was known before he took out his patent, and may inquire of A., B. and C., who are named as having used the alleged invention, and ascertain whether the defence is made out or not, and this would have the effect of abridging litigation.

On these grounds I consider that I am bound to follow the decision in *Finnegan v. James*, and to hold that the second

⁽¹⁾ Law Rep., 2 Eq., 459.

⁽²⁾ Law Rep., 19 Eq., 72.

⁽³⁾ Law Rep., 19 Eq., 73.

exception *must be allowed. I prefer doing this be- [540
cause I am deciding upon the substance of the objection.
The defendant must set out the names of some of the per-
sons who are alleged by him to have used the invention
prior to the date of the patent.

The first exception will consequently be overruled, and
the second allowed. The defendant may have three weeks
to put in his answer.

Solicitor for plaintiffs: *Horace Philbrick*.

Solicitors for defendant: *Emmet & Son*.

See U. S. R. S., § 4920; Curtis on Patents, §§ 369-371; Law on Patents, tit.
General Issue.

[2 Chancery Division, 540.]

V.C.M., March 15, 1876.

MORRIS V. DEBENHAM.

[1875 M. 22.]

*Vendor and Purchaser—Specific Performance—Joint Sale by Trustee and absolute
Owner—Apportionment of Purchase-money.*

A trustee having a discretionary trust for sale of real estate under a will at such
price as he should think reasonable, with power to postpone the sale, leased the prop-
erty for thirty years with the concurrence of the beneficiaries. Before the lease
expired the property was put up for sale by the lessee and the trustee conjointly,
the facts being disclosed by the particulars of sale, and a sale having been effected,
the purchase-money was apportioned between the two interests according to the
valuation of a skilled valuer:

Held, that the purchaser was not entitled to insist on the concurrence of the bene-
ficiaries on account of the valuation not having been made before the sale, and that
the title would be forced upon him.

Observations on *Rede v. Oakes* (2).

THIS was a vendor's suit for specific performance of a con-
tract to purchase certain real estate formerly belonging to
Valentine Morris, who died on the 6th of November, 1848,
having by his will, which was dated the 26th of February,
1848, devised his real estate to trustees, who were now rep-
resented by Richard William Morris, the first-named plain-
tiff, upon trust that they or the survivors or survivor of them
should, at such time or times, and when and as he or they
should think proper, absolutely sell and dispose of all his
real estate, either together or in parcels, at one *time. [541
or separate times, and either by public auction or private
contract, for such price or prices, and subject to such stipu-
lations as to title and other conditions of sale as to his trust-
tees or trustee might seem reasonable, proper, or expedient.

(1) 4 D. J. & S., 505.

With regard to the application of the proceeds of the sale of the real estate, there was, amongst other trusts, one for raising £5,000 for the benefit of one of the testator's daughters on her marriage, and there was an ultimate trust of the residue for the testator's five children equally.

The trustees postponed the sale of the real estate of the testator, which consisted chiefly of freehold house property at St. Mary-on-Hill and Love Lane, in the city of London, and the payment of the £5,000 was secured by a deposit of the deeds; and by a deed of the 28th of February, 1863, to which the beneficiaries were parties, the real property was leased for thirty years from the 25th of December, 1862, at a rent of £330. This deed, however, was not acknowledged at the time of execution by one of the married daughters, but this omission was supplied at the time of the present sale.

The lease had subsequently become assigned to William Holland, the secondly named plaintiff, and the property had been sublet by him at rents amounting in the aggregate to £670.

The £5,000 charge having become payable, it was arranged to put up the property for sale by auction, and it was considered that a better price would be likely to be obtained by selling the entire property together, subject only to the underleases, than by sales of the leasehold interest and the reversion separately.

The property was accordingly put up for sale by auction in one lot, being set forth in particulars, which, after describing it in detail, including the underleases, continued: "The above property was leased by the trustees of the will of the late owner, Valentine Morris, Esq., with the concurrence of the parties beneficially interested under his will, for thirty years from the 25th of December, 1862, and has been let by the lessees or their assignee on underleases at the above rents. The assignee of the above lease will concur in the present sale, and so the property will be offered for sale subject to the above underleases only." In this particular the sale was in three places announced as being made by the trustee of Mr. Morris's will.

542] *The property was not sold at the auction, but on the 12th of August, 1874, an agreement was entered into by the plaintiffs for the sale of it to the defendant for £15,250, the contract signed being the formal contract appended to the particulars and conditions of sale prepared for the auction, which stated that the sale was made subject to the particulars.

The purchaser, amongst other requisitions on the title, made the following:—

"2. Unless the parties beneficially interested in the property had joined in the lease of 28th February, 1863, a sale subject to the lease could not have been enforced against a purchaser, nor can it now be sustained without some evidence that the beneficiaries had not sold or disposed of or settled their shares; but assuming that the proper persons were parties to the lease, the purchaser is advised that the present sale of the freehold and leasehold interests, the leasehold interests being vested in a third party subject to outstanding underleases, which fall in at different times, cannot be supported, such a sale not being warranted by the will of the late owner, and that consequently the parties who are the equitable owners must concur in the conveyance. It must, therefore, be shown who these parties are.

"3. Have the equitable owners purchased the leasehold interest vested in Mr. Holland? If so, this is an additional reason why they should concur in the conveyance."

To these requisitions the following answers were made:—

"2. This statement, we contend, is incorrect, and we object to the equitable owners being called upon to concur in the sale. Mr. Richard William Morris, as surviving trustee of the testator's will, sells the freehold only, and Mr. Holland, as assignee of the lease of the 28th of February, 1863, sells his leasehold interest.

"3. No. Mr. Holland is to receive £3,000 out of the purchase-money for his leasehold interest, and the balance, £12,250, is for the freehold interest."

By the replies to these answers requisition No. 2 was repeated and the purchaser insisted on the concurrence of the beneficiaries. But the vendors' solicitors, on the 13th of October, 1874, wrote to the purchaser's solicitors a letter in which the following passage *occurs: "Mr. R. [543 Morris has not purchased, or agreed to purchase, Mr. Holland's interest in the lease of 1863. He alone sells the freehold, but for the benefit of his trust estate before the sale he arranged with Mr. Holland to concur in selling his interest and receiving £3,000 for his leasehold interest, not from Mr. Morris, but the purchaser." They also refused to obtain the concurrence of the beneficiaries.

The purchaser then refused to complete, and the present bill was filed.

There were affidavits by two independent surveyors, each of whom fixed upon £3,226 as the proper proportion of the

whole purchase-money attributable to the leasehold interest, and stated that it was very advantageous to the persons entitled to the beneficial interest to sell the lease and reversion together. One of them fixed the value of the reversion, if sold separately, at £10,200, and the other at £10,440; so that, on their evidence, there was a considerable profit on the transaction. It was arranged that £3,100 should be paid to Mr. Holland, and the rest to Mr. R. W. Morris.

Glasse, Q.C., and *Langworthy*, for the plaintiffs: The defendant attempts to bring this case within *Rede v. Oakes* ⁽¹⁾, but that was a case where there were no sufficient data to enable any apportionment of the price to be made, and the apportionment then made was entirely arbitrary, and by persons who had no power to act in that manner. It was, moreover, open to question whether the trust property had not been injured by being put up for sale together with other property. There was at least no evidence that it was beneficial to sell the properties together. The present case is much more like *Cavendish v. Cavendish* ⁽²⁾, where such an objection as the present was treated as frivolous. There is nothing contrary to principle in selling two properties together at one price if a fair apportionment can be made: *Graham v. Oliver* ⁽³⁾.

The purchaser is, moreover, bound by the terms of the particulars, which gave him notice of the existence of the 544] lease, and the *manner in which it was made, and of the fact that the vendor was a trustee: *Micholls v. Corbett* ⁽⁴⁾.

J. Pearson, Q.C., and *E. Cutler*, for the defendant: If the argument of the plaintiffs succeeds, the burthen is thrown upon the purchaser of seeing whether, in the absence of the beneficiaries, the price is properly apportioned. And the particulars do not really disclose the interest of the lessee. There is nothing in them to show that he had any beneficial interest in the property. The principle is the same whether a lease and reversion, or two adjoining plots of land, are sold. All that the requisition amounted to was, that it should be shown that the beneficiaries were satisfied. The distinction between this case and *Cavendish v. Cavendish* ⁽²⁾ is that in that case the destination of the proceeds of the sale of the two properties was the same. Here the destinations are quite different. This case is exactly like *Rede v. Oakes* ⁽¹⁾. If the trustee had fixed the price for the reversion before the sale, a title might

⁽¹⁾ 4 D. J. & S., 505.

⁽²⁾ Law Rep., 10 Ch., 319.

⁽³⁾ 8 Beav., 124.

⁽⁴⁾ 3 D. J. & S., 18.

possibly have been made. But that was not done, and it is too late to make an apportionment after the sale. In *Micholls v. Corbett* the decision was only that under the conditions of sale the purchaser had precluded himself from taking the objection, and there had been a suit to determine the rights of the beneficiaries. There is no case to be found in the books in which a trustee has, without the concurrence of the beneficiaries, put up property for sale, and together with it other property has been put up by a beneficial owner, and the sale has been allowed to stand. Moreover, it did not appear from the particulars that the concurrence of the beneficiaries could not be obtained.

MALINS, V.C., after referring to and commenting on the facts, continued:

With regard to the objection to the title, it cannot be said, and indeed it is not attempted to be said, that a title has not been made to the reversion in fee or to the lease, or that the lease together with the reversion in fee does not make up a fee simple in possession. But the objection to the title is that the property was sold *at one entire [545 price of £15,250, although the lease was the property of the assignee, and the reversion in fee was trust property. It is true the conditions of sale do not say that the lessee has any beneficial interest, or that any portion of the purchase-money will be attributable to him, but no one can read the particulars without seeing that the purchaser is buying subject to the lease. He might well have inferred that the lessee had some interest. It is said that property which is held in trust and property which is not held in trust cannot be put up in one lot together. I am of opinion that such an objection cannot be sustained. Something of the kind has undoubtedly been said in the case of *Rede v. Oakes* (*) by Lord Justice Turner, but the judgment proceeded on such technical grounds, and is open to such doubts, that I cannot look upon the case as applicable to the present one, and I certainly cannot sanction the notion that a sale under such circumstances is vitiated when the court has provided ample means of ascertaining what portion of the purchase-money is attributable to the one and what to the other.

I went fully into the question in the case of *Cavendish v. Cavendish* (*), and I there negatived the notion that such an objection could be sustained, though both Mr. Glasse and Mr. Phear had argued for the opposite view with great energy and perseverance. In that case, Cavendish House and the house adjoining were put up for sale and sold at one

(*) 4 D. J. & S., 505

(*) Law Rep., 10 Ch., 319.

entire price, it being erroneously assumed in the conditions of sale that General Cavendish was seised in fee simple of both houses, the fact being that Cavendish House was held in fee, and the adjoining house under a different title. I said in that case that the proper thing to be done was to ascertain what were the respective values, and apportion the purchase-money between them, and that if the concurrence of all persons was obtained the purchaser would get a good title to the fee simple, and that was all that could be required.

There was an appeal, and it seems that Mr. Phear argued that there were two properties vested in different trustees and held on different trusts, which were sold by one contract for one lump sum, which was to be paid into court in a suit relating only to one of them. If provision had been made 546] for apportioning the *purchase-money and paying the part attributable to the settlement to the proper parties, the purchaser would not have taken any objection, but payment into court, in a suit which had nothing to do with the settlement, was no answer to the persons entitled under it. He said the case was governed by the case of *Rede v. Oakes* (¹), and no doubt it was. But Lord Justice James said (²): "The sale of the two houses together is clearly beneficial to all parties, and the objection taken is of the most technical character. The purchase-money may, however, at once be apportioned in Chambers, which will only require an affidavit by the surveyor who has been employed about the sale. The part apportioned to 33 Old Burlington Street, may then be paid in to a separate account so as to distinguish it."

That question arose by reason of a purchase by trustees under a power by means of part of their trust funds of a freehold house, 33 Old Burlington Street. This house appeared to have been regarded by all parties as belonging to General Cavendish, subject to a charge, and was treated as included in the direction for sale of his adjoining house contained in the decree. The purchaser took the objection that it did not appear from the abstract that there was any right or power to sell the Burlington Street house in the lump with the Cavendish mansion as part of the estate of General Cavendish, and I decided that the objection was invalid, and ordered the purchaser to pay the money into court.

Well, what applied to that case applies to this. There the money was apportioned, and here it must be apportioned also. How is that to be done? If the matter were brought before the Chief Clerk, all that would be required is an affi-

(¹) 4 D. J. & S., 505.

(²) Law Rep., 10 Ch., 321.

davit of the surveyor. Now, here there is the clearest evidence of value. There are the affidavits of two very eminent men, who both speak positively as to the proper price to be paid for the leases. They differ slightly only as to what would be the price if sold subject to a lease. I cannot see the use of sending this to Chambers to ascertain and settle that which my Chief Clerk could ascertain in a moment. Therefore I am of opinion that it is unnecessary to refer this to Chambers, because the vendor selling the reversion in fee is armed with the power of fixing the price, whether there be a sale of the lease and reversion together or not.

*On every ground I think the title a perfectly [547 good one, and the objection one which ought never to have been taken, and perfectly unsustainable.

There must be a decree for specific performance of the agreement, and the title being so clear, and the objection so futile, the defendant must pay the costs of the suit.

Solicitors: *Whites, Renard & Co.; T. G. Bullen.*

[2 Chancery Division, 594.]

V.C.H., Jan. 31, 1876.

*HERITAGE V. PAINE.

[594

[1872 H. 209.]

Limited Company—Sale of Shares on Stock Exchange to Jobbers—Infant Transferee—Indemnification of Vendor by Jobbers—Winding-up—Vendor—Contributory—Agreement by Liquidator with Vendor—Effect on Jobber's Liability to indemnify.

The owner of sixty £100 shares in a company, on each of which £10 had been paid up, sold them on the Stock Exchange to jobbers, who furnished the name of a purchaser to whom the shares were transferred, and in whose name they were registered. The company was afterwards ordered to be wound up, when it turned out that the purchaser was an infant at the time of the transfer; and his name was thereupon removed from the list of contributories, and that of the vendor placed thereon. The vendor then filed his bill against the jobbers to compel them to indemnify him against all liability in respect of the shares, and to repay him all calls he might have to pay thereon, with costs. After the defendants had put in their answer, an agreement was entered into between the plaintiff and the liquidator for a compromise of the plaintiff's liability on the shares (amounting to £5,400), the terms of which were, in substance, that the plaintiff should pay the liquidator £2,000, transfer the shares to him, and authorize him to use his name in all proceedings against the defendants, and to retain all moneys recovered therein, which were to be applied in recouping the plaintiff the £2,000, and in satisfying all liability on the shares, in consideration whereof the plaintiff was, after all proceedings were over, to be released from all liability on the shares without further payment. Upon the hearing of the cause (*Nickalls v. Merry* ⁽¹⁾) having meanwhile been decided in the House of Lords, the defendants did not dispute their liability to the plaintiff as vendor of the shares, but they contended that the release comprised in the agreement enured for their

(¹) 13 Eng. R., 55. •

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Heritage v. Paihe.

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benefit, so as to make the £2,000 payable thereunder by the plaintiff the measure of their own liability either to the plaintiff or to the liquidator:

Held, that, the object and spirit of the agreement being to keep up and enforce the liability of the defendants, they could not set it up without giving effect to all its provisions, and consequently that it did not operate as a release in their favor, or relieve them in any degree from their liability to pay the full amount payable on the shares.

Observations on the authorities, including *James v. May* (1) and *Kains v. Paine* [1874 K. 21].

IN the month of October, 1865, the plaintiff, who was the owner of sixty £100 shares in the Contract Corporation, 595] Limited, on which *£10 only had been called or paid up, sold the shares, through his brokers, on the Stock Exchange in the usual manner, to the defendants, Messrs. Hammon & George Payne, who were members of the Stock Exchange, and carried on the business of stockjobbers in partnership. On the "name day" the defendants delivered to the plaintiff a ticket in the usual form, giving the name of one Henry Baker as the proposed transferee of the shares. A transfer to Baker was accordingly executed on the 25th of October, 1865, and Baker's name was registered in the books of the corporation as the holder of the shares. On the 20th of March, 1866, the corporation was ordered to be wound up, and by an order made in the liquidation by the Master of the Rolls on the 11th of November, and affirmed by the Lords Justices on the 8th of December, 1871, Baker's name was, upon his own application, removed from the list of contributories, upon the ground that at the date of the transfer of the shares to him he was an infant of the age of nineteen. On the 17th of April, 1872, the plaintiff was, on the application of the liquidator, placed on the list of contributories in respect of the sixty shares transferred to Baker, and he thus became liable for calls to a very large amount. The plaintiff then, in August, 1872, filed the bill in this suit, praying for a declaration that the defendants were bound to indemnify him against all liability in respect of the sixty shares, and that they might be ordered to repay him all calls he had paid or might be compelled to pay in respect of the shares, and all costs occasioned by his being placed on the list of contributories, and to give him such indemnity as the court might consider sufficient against any liability to which he might be subject in respect of the shares.

The defendants, by their original answer to the bill, stated that they were in total ignorance as to who Baker, the transferee, was, or whether he was in fact an infant; that his

• (1) 7 Eng. R., 35.

name was supplied to them by a firm of stockbrokers to whom they had themselves sold the shares; and that they, the defendants, were not responsible for having had an improper name supplied to them, as, according to the custom of the Stock Exchange, the original vendor was bound himself to make inquiries as to the sufficiency of the name, and that, having accepted the name supplied, the contract had become one between the seller and the nominee, so as to *relieve the jobber from all responsibility; and they [596 claimed the benefit of the Statutes of Limitation.

After the defendants had put in their answer, an agreement for the compromise of the plaintiff's liability in respect of the sixty shares was entered into between him and the liquidator. By this agreement, which was dated the 9th of July, 1873, after reciting the transfer from the plaintiff to Baker, the infancy of Baker at the time of the transfer, and the rectification of the list, and that a call of £90 per share had been made upon the plaintiff in respect of the sixty shares, in respect of which there was due from him the sum of £5,400, and that plaintiff alleged that the defendants were bound to procure for him a release and indemnity from all liability and loss, and had filed a bill against them to enforce his demand, and that the plaintiff had proposed, in consideration of the agreement with the liquidator therein contained, to pay him the sum of £2,000, and to give him the authority thereafter contained, it was thereby agreed—

1. That the plaintiff should pay to the liquidator the sum of £2,000, and should, when required, transfer to the liquidator on behalf of the company the sixty shares, and all his interest therein, and in the distribution of the assets of the company.
2. The plaintiff authorized the liquidator to use his name in instituting, prosecuting, or compromising any proceedings or claims (including the suit of *Heritage v. Paine*) against the defendants or any other persons in respect of the shares, for the purpose of compelling them to procure a release for the plaintiff from all liability in respect of the shares, or to pay the calls made or to be made upon them.
3. That the plaintiff should give the liquidator every assistance in the prosecution of any such proceeding or claim.
4. The plaintiff authorized the liquidator to retain any moneys received in the suit against the defendants in respect of the shares, and thereout to retain his costs and expenses, and then to apply one moiety of the surplus, first, in satisfying any indebtedness of the plaintiff to the liquidator in respect of the £2,000, and, secondly, in repaying

to the plaintiff any moneys paid on account of the £2,000, without interest, and the remaining moiety, and the excess of the first moiety, and all other moneys received by the liquidator, after deducting expenses, were to be applied by the liquidator in satisfaction of so much of the plaintiff's 597] liability on the shares as was not *satisfied by the £2,000, provided that when more than £5,400 and the costs should have been recovered or paid, the liquidator should pay the plaintiff the surplus. 5. The liquidator should forthwith after the termination of all suits, under the authority aforesaid, procure for the plaintiff an absolute release from all liability in respect of the sixty shares, without any further payment. 6. The company should keep the plaintiff indemnified against all costs and expenses. 7. If the plaintiff made default in payment the liquidator might either enforce payment or abandon the agreement. 8. The agreement was not to prejudice or affect the rights and remedies of the company or the liquidator against any other contributory.

The defendants, having become aware of this agreement, on the 13th of July, 1875, filed a supplemental answer, whereby they stated the agreement, said that they believed the £2,000 had been paid, and they insisted that, having regard to its provisions, the liquidator could not now enforce any calls against the plaintiff in respect of the shares, as to which the plaintiff was no longer under any liability whatever, so that the utmost relief to which he could be entitled against them was the payment of the £2,000 and interest; that the suit was in fact the suit of the liquidator; that the plaintiff only sued as a trustee for the liquidator, to whom the defendants were never under any liability, the plaintiff being the only person liable to the company; and that, as between the plaintiff and the defendants, if he had been released from liability, such release enured for the benefit of the defendants.

The plaintiff then amended his bill by alleging "that he was, and had ever since the 12th of October, 1865, been, a trustee for the defendants of the said sixty shares," and that the defendants were, under the circumstances therein appearing, and by the usage and practice of the Stock Exchange thereinbefore mentioned, "bound to indemnify and protect the plaintiff against all liability in respect of the said sixty shares;" and that he "had entered into an arrangement with the company, under which he was now suing partly as trustee for the company."

The cause now came on for hearing, and it being admitted

that after the decision in *Nickalls v. Merry* (1) the defendants could *not dispute their liability to the plain- [598
tiff as vendor of the shares, the question argued was whether the agreement entered into between the plaintiff and the liquidator had varied the rights of the parties so as to relieve the defendants from any, and what part, of that liability.

Dickinson, Q.C., and *Romer*, for the plaintiff: The agreement comprised in the deed of the 9th of July, 1873, leaves the liability of the defendants just where it was. The whole scheme of the arrangement was to keep their liability fully to indemnify the plaintiff on foot, to enable the liquidator to sue in the plaintiff's name; and it is not until everything has been recovered from the defendants that the plaintiff is to have the release, which the defendants contend now enures for their benefit. The same sort of arrangement was upheld by Vice-Chancellor Malins on the hearing of *Hemming v. Maddick* (2), whose judgment was affirmed by the Lords Justices (3), and was also upheld in *James v. May* (4), though when that case came before the House of Lords it turned out that the deed, on the effect of which the arguments up to that time had chiefly turned, had, in fact, never been executed.

We are entitled not only to be recouped the £2,000 which we have paid to the liquidator, but to a decree which will indemnify us to the full extent of the unpaid calls, with interest and costs.

Bristowe, Q.C., and *W. W. Karslake*, for the defendants: The plaintiff, who alleges that he is suing as trustee for a company, cannot recover more than he is absolutely indebted, or has paid to the company. The arrangement for the compromise of the claims against the plaintiff carried out by the deed of the 9th of July, 1873, comes to this, that the company, having through its liquidator a clear claim against the plaintiff for unpaid calls, agrees that if he will pay to the liquidator £2,000, that sum shall be the measure of his liability, and after that agreement the liquidator can never obtain one penny more than the £2,000 from the plaintiff. The plaintiff having paid this £2,000, is under no *fur- [599
ther liability, and the indemnity to be given to him by the defendants ought not to extend beyond his liability, and should be limited to repaying him the £2,000 with interest.

Kains v. Paine [1874 K. 21] was a similar suit to the

(1) Law Rep., 7 H. L., 530.

(2) Law Rep., 7 Ch., 395.

(3) Reported on an interlocutory application, Law Rep., 9 Eq., 175.

(4) Law Rep., 6 H. L., 323.

present; the only difference (if in principle it be one) being that there the agreement for compromise between the liquidator and the plaintiff was entered into before the commencement of the suit. The Master of the Rolls in that case, in his decree dated the 6th of May, 1875, after declaring that the defendants were bound to indemnify the plaintiff against all losses already incurred in respect of the shares there in question, directed an inquiry whether the plaintiff was under any and what further liability in respect of the shares, which inquiry must have been granted on the footing that the compromise had altered the plaintiff's rights. We are willing to submit to a decree in that form.

The compromise in this case in effect amounts to a covenant not to sue, and that is a release in law (*).

If the plaintiff was discharged as between himself and the liquidator, the liquidator can have no further right against the defendants; honesty would forbid it.

[HALL, V.C.: It is not a question of honesty; the parties have tried to keep matters *in statu quo* in order to hit the right persons.]

This is a simple contract of indemnity, and the court has to decide as between the plaintiff Heritage, who asks to be indemnified against future liability, when all possible calls have been made and he has been released from them, and the defendants, between whom and the liquidator there is no privity. This is no case of trusteeship. *Hemming v. Maddick* (*) and *James v. May* (*) are cases of trusteeship, and it is but right that a trustee should be fully indemnified by his *cestui que trust*. So also was *In re National Financial Company* (*), where Maitland was a trustee exposed to liability for future calls. But there is no trust in question in this case, nor anything but the effect of the contract. If the plaintiff is under no future liability, then the defendants [600] can only *be called upon to indemnify him to the extent of the £2,000 and interest, and the decree to that effect ought to be made without costs.

[They also referred to *Cruse v. Paine* (*).]

HALL, V.C.: When the bill in this suit was filed the state of the law as regards the liability of a purchaser of shares to indemnify the original vendor under such circumstances as exist in this case was in an unsettled state; and the substance of the defence set up by Messrs. Paine in their answer was that, under the circumstances, they were

(1) 2 Wms. Saund., pl. 1, 150 b.

(*) Law Rep., 3 Ch., 791.

(2) Law Rep., 9 Eq., 175.

(*) Law Rep., 4 Ch., 441.

(3) Law Rep., 6 H. L., 328.

not liable to indemnify the plaintiff. The pleadings and the issues between these parties were in that state when the decision of *Nickalls v. Merry* (¹), in the House of Lords, established the liability of persons in the position of Messrs. Paine in similar transactions, to indemnify the vendor. Therefore, the law being so settled, if matters had remained in that position, there would have been nothing to try between these parties, and there must necessarily have been a decision in favor of the plaintiff.

An arrangement was, however, come to between the plaintiff and the liquidator of the company in reference to the plaintiff's liability and to the payment of the calls made or to be made in respect of the shares; and the plaintiff thereupon amended his bill by stating "that he was, and had ever since the 12th of October, 1865, been, a trustee for the defendants of the said sixty shares," and that he "had entered into an arrangement with the company, under which he is now suing, partly as a trustee for the company." The defendants then having ascertained what the exact nature of that arrangement was, set it out in a supplemental answer, and submitted that its effect was to release and discharge them from any payments to be made in respect of the shares in question other than and except such payments as under that arrangement were to be made by the plaintiff out of his own pocket. The substance of that arrangement was, that the plaintiff was to pay by certain instalments a sum of £2,000, with interest; and if he on his part per- [601] formed in all respects the engagements of the deed of arrangement, he was not to be called upon to pay anything more. But the deed also provided, in effect, that this arrangement was only as between the plaintiff and the liquidator, that the then existing suit which was going on to make the defendants liable for the whole amount of the calls should go on, and that, in substance, what could be got in that suit should be got for the benefit of, and paid over to, the liquidator. The substance of the arrangement, therefore, as between those parties, was not to relieve the defendants from anything whatever; on the contrary, to keep up and enforce their liability, and to procure all that could be got under it; and, instead of putting what was procured into the pocket of the plaintiff, to let it go, where it must eventually go, into the pocket of the liquidator; and its working as between the plaintiff and the liquidator (between whom, in reference to this particular claim, there was, as has been said, no privity) would be substantially

(¹) Law Rep., 7 H. L., 530.

the same as if the plaintiff had borrowed the money to pay the liquidator the whole of his demand—the whole of the demand being what undoubtedly the plaintiff, in the absence of any arrangement, was entitled to recover from the defendants; and having so paid it over to the liquidator, the plaintiff would then be left to get it back again from the defendants, Messrs. Paine.

The contention before me however is, that this arrangement operated as a release to the plaintiff, and that inasmuch as he cannot now be sued, and is to be indemnified by the liquidator from all costs in the further prosecution of the suit, that on payment of the £2,000 that agreement operates for the benefit of the defendants, who in the absence of it would have been liable to pay over £3,000 more.

If this contention be correct, the parties must have wonderfully miscarried in carrying into effect what they desired to accomplish. Unquestionably, as matters stood at that time, the liquidator might have claimed from the plaintiff not merely the £2,000, but the full amount of all the calls, and, if they had not been paid, might have made him bankrupt, and have recovered any balance from the defendants. To say that the effect of the arrangement is that it operates as 602] a release to the defendants is, *I think, to disregard not only its clear and express terms, but also its spirit; and it would be against all principle to allow the defendants to claim the benefit of the arrangement comprised in the deed as a release to them, and at the same time entirely to disregard that which was of the essence and the spirit of the same arrangement, that although the plaintiff was released, the claim against the defendants was to be prosecuted to the full extent. To permit this would be to allow the defendants to approbate and reprobate. If they set up that deed as one of which they can claim the benefit, they must do so, giving effect to all its provisions; and an essential part of those provisions is, that the then existing suit shall go on, and all that can be recovered shall be recovered for the benefit of the liquidator. In other words, the nature of the arrangement was that matters should remain *in statu quo* as between the plaintiff and the defendants; that the plaintiff should become a trustee of, and pay over to the liquidator all that should be recovered from the defendants, paying also to the liquidator the £2,000, which sum he was to get back again if he could, but could only do so if Messrs. Paine were made liable, but as to that he took his chance. That, therefore, is the view which I take of the case, upon principle and irrespective of authority.

Then as to the authorities. It has been said that the cases which have been referred to were not cases of this kind, but cases of trusteeship in which a trustee, who must be fully indemnified, has sought for indemnity against his *cestui que trust*, and that there was a distinction between the indemnity in such a case and that to which a vendor of shares, under such circumstances as are here present, would be entitled as against an immediate purchaser from him. Now I will not say whether or not it may be possible to draw any such distinction between the two cases; but for all substantial purposes, and for the purposes of this suit, I think there is no such distinction where the transfer was set aside on account of the infancy of the transferee.

The plaintiff was in the position of a fully paid vendor, who had received everything he was entitled to, and he had become a trustee for his purchaser of the subject-matter of the sale, which, however, instead of being valuable was the reverse. Therefore, it seems to me that the case became one of a trustee and *cestui que trust*, and that there [603 really is no distinction between the two cases. But whether there be or not, there is, I think, no distinction in substance.

The cases that were referred to were, first, *In re National Financial Company*(¹); but the particular question which arises in this case, as to the effect of a deed of indemnity, did not there arise; and the only bearing that that case has upon the present is, that *James v. May*(²), which is somewhat in point, was treated as governed by the same principles. *James v. May* was first before Vice-Chancellor Stuart, who declined to make any order upon the summons, on the ground that he did not think that any trust had been proved; it then went before the Lords Justices, and they discharged the order of the Vice-Chancellor, and granted the prayer of the summons; and it finally came before the House of Lords, who affirmed the judgment of the Lords Justices. The circumstances in that case were somewhat similar to the present. There had been a deed of arrangement entered into between May, the trustee, and the directors of the Wharves Company, which was dated the 6th of August, 1869, before the commencement of the litigation as to the indemnity, which was by application in the winding-up. I mention that, because there is that difference between *James v. May* and the present case (which is certainly not unfavorable to the latter), and also between *James v. May* and *Kains v. Paine*. I have been furnished with the printed case before the House of Lords in *James*

(¹) Law Rep., 3 Ch., 791.

(²) Law Rep., 6 H. L., 328.

v. *May*, which contains particulars as to the deed of the 6th of August, 1869, and also the judgments of the Lords Justices, which are not to be found in the reports. In that case, it was a part of the arrangement comprised in the deed that, "in consideration of the Wharves Company agreeing (as they hereby do) to forego their right of process against the said James Alexander May personally in respect of the matter hereinbefore mentioned, and for other good considerations, the said James Alexander May doth hereby assign to the Wharves Company and their successors all and every the sums and sum of money which the said James Alexander May is, or he or his successors may hereafter become entitled to receive from the said International 604] Contract Company in respect of or towards *or in the shape of dividends upon the sum of £24,890 and interest, and costs, charges and expenses hereinbefore mentioned, together with the power in the name or names of the said James Alexander May, his executors or administrators, or otherwise, to demand, enforce, receive payment and delivery of the said premises hereinbefore expressed to be hereby assigned, and upon such terms as the said attorneys shall think fit to adjust and settle." It was a deed and an arrangement much of the same character as in the present case, but the deed was not so complete in its provisions as in the present case; and the contention before the Lords Justices in that case was, as it is here, that the deed had got rid of the liability altogether. Lord Justice James would not allow that: he considered it a reasonable arrangement that whatever should be recovered should be handed over so as to go into the right pocket. The Lord Justice Mellish took the same view, and expressed himself thus: "Then it is said that the deed has got rid of it. I cannot see how that can be. The Lord Chancellor says this in *In re National Financial Company* (1), that the trustee need not wait until he is actually sent to prison, but is entitled, on being threatened, at once to commence his suit or his claim, if it is under the Winding-up Act, for the purpose of obtaining his indemnity. Then why may he not say to the people who threaten to sue him, 'Do not sue me; if you do not sue me I will allow you to use my name in prosecuting the inquiry.' That is substantially the effect of the deed, and I do not see why it should not be perfectly good, because the effect of it merely is to make those who ought unquestionably to pay the costs, pay them."

Mr. Bristowe, in his very able argument, contended that

(1) Law Rep., 3 Ch., 794, 795.

the deed operated as a release. He referred to cases in which it has been held at law that a covenant not to sue may operate as a release. But there is no covenant here not to sue. The covenant or engagement is, that if Heritage does all that is required by this agreement in the way of facilitating the suing of the Messrs. Paine, and making these payments, and otherwise, then, when the liquidator has got from Messrs. Paine what, according to this engagement, Heritage was, by giving the use of his name, to assist him in getting, the liquidator would do his best to get *him a release. It is no release of existing matters, [605 but it is one conditional and dependent upon that being done which I am asked to say cannot be done at all, and which, it is contended, is not within the meaning of the arrangement. It would be a contradiction of the terms of the arrangement to call that a release as operating in any way as an engagement not to sue the plaintiff, except coupled with this, that he is to do all this, and that that is to be part of the arrangement that is being done, and being continued to be done, by this suit; and this cause is brought to a hearing for the purpose of obtaining a decree to give effect to this arrangement, and without which the arrangement will not be given effect to.

Then there is the case of *Hemming v. Maddick*, which was first before Vice-Chancellor Malins (1) on an application to amend the bill, when his honor did not seem to have taken a very favorable view of the case of the plaintiff, who was substantially in the same position as the plaintiff in the present case. There had been a deed executed in that case very much of the same character as that in this suit. The cause, however, came before him upon the hearing, and then he made a decree in the plaintiff's favor. That was the subject of an appeal, which was dismissed with costs (2). The respondent's counsel were not called upon, and the Lords Justices, whose judgments are very short, held that the trust was clearly established, and that the plaintiff was entitled to an indemnity against calls.

That is the state of the authorities, except that *James v. May* subsequently went to the House of Lords. There, again, as in the present case, a deed was relied upon, and that deed was not substantially different from the present one, except as to its form, and except that the present deed was executed after the institution of this suit. It was there contended that the deed was a release; and it was only

(1) Law Rep., 9 Eq., 175.

(2) Law Rep., 7 Ch., 395.

after considerable argument that it was found out that the deed in fact had never been executed, and had no existence at all⁽¹⁾. Therefore the argument was all thrown away. So matters remained. Lord Cairns made an observation 606] *upon it, but thought it better not to intimate what opinion he might be inclined to form after full argument, supposing the deed were established. The respondents had not been heard, and there the matter rested.

I have already dealt with the case upon principle, independently of the authorities; but the authorities, which must be dealt with as I find them, have a bearing upon the case, and I am bound to follow the authority of the Lords Justices in *James v. May*. There was nothing that took place in the House of Lords which I can regard as intimating an opinion adverse to that of the Lords Justices. Upon my own judgment, and following their decision, I hold that the plaintiffs are right.

The only other authority which it is necessary for me to mention is the case of *Kains v. Paine* [1874 K. 21], which was argued before the present Master of the Rolls. I have been furnished with the shorthand notes of the argument and of what took place upon the hearing, the whole of which I have read. That case took up part of two days before the Master of the Rolls, and each side in this case has claimed the benefit of his observations. The Master of the Rolls, however, ultimately came to the conclusion that he could not deal with the case satisfactorily, owing to the number of the items of account, and the manner in which the matters in question were involved. What he said was in effect this: "This is an item in the account; you are entitled to the indemnity, no doubt, but these discussions about the extent of liability, under the circumstances, will be involved when you come to that item, and for which you claim a particular sum in respect of calls made, and so forth; and I think, under those circumstances, it is the course of the court not to deal with that particular item, but I must direct an inquiry, and have an account taken." The Master of the Rolls said at last, the form of the decree being discussed: "That will leave the point entirely open." So it is entirely open, I conceive, under that decree, and it will come before him, upon the certificate, for discussion.

The case before the Master of the Rolls was of a much more complicated character as regards the particular matters which were the subject of the account and the inquiry

(1) This fact is not stated in the report from the judgments of Lords Chelmsford and Cairns, 6 H. L., 328, but appears

than the present case. In that case the deed had been executed before the litigation *commenced, and the Master of the Rolls, in distinguishing the case before him from one of the earlier cases, dealt with it in a way that seemed to indicate that he thought there was a substantial difference between the two cases. Whether it is fair or right to say that he entertained that view, or merely threw it out, it is not necessary for me to say. This case is, as regards the extent and character of the claims, one of a very simple character, involving no complication of facts or details, although probably there may be some inquiry as to the amount. But the case having been most fully argued and discussed on the present occasion, it seems to me that the proper course for the court to take is not to withhold giving its judgment in reference to the particular matter in dispute, because such judgment will dispose of it. I can do this in one of two ways, either by making a declaration or by giving directions in the decree that the account shall be taken upon certain principles in reference to the claim in dispute; and that I mean to do, so that I shall not have this matter before me again upon exceptions to the certificate. I will frame it in such a way as that the parties, if they desire it, may, without delay or difficulty, take the opinion of the Court of Appeal upon the question. I understand that the whole £90 has been called up, and the case in that respect differs from *Kains v. Paine*, where, although it was the same company, at the time when the suit was instituted £85 only had been paid up.

I declare that the defendants are bound to indemnify the plaintiff, and the plaintiff having paid £2,000 to the liquidator, that sum, with interest, must be repaid to him by the defendants; and I also declare that the defendants are liable to pay to the liquidator the whole of the calls to be made by him, and the plaintiff requesting that the amount to become payable by the defendants be paid to the liquidator, order payment to the liquidator accordingly. As regards the amount of the interest upon the unpaid calls, unless the parties agree upon the amount, there must be an inquiry.

Solicitors for plaintiffs: *Linklater, Hackwood & Co.*

Solicitors for defendants: *James Crowdy & Sons.*

[2 Chancery Division, 621.]

C.A., Jan. 22; March 15, 18, 1876.

621] *In re HEREFORD AND SOUTH WALES WAGON AND ENGINEERING COMPANY.*Company—Concealment—Fraud—Promotion-money—Charges—Void Agreement.*

By an agreement made between the vendor of certain ironworks and W. and H., it was agreed that, if W. and H. succeeded within three months in getting up a company for the purchase of the ironworks at a valuation, they should, out of the purchase-money, receive £1,500. By an agreement dated a few weeks later, the vendor agreed with W., as trustee for the company, that the company should buy the ironworks at a valuation. W. and H. did not get up a company within the three months, but after some time they formed a company with seven shareholders, who were also the directors. These shareholders were not informed of the agreement to pay W. and H. the £1,500. The company was registered, and by the articles of association the agreement for the purchase of the property at a valuation was adopted, and it was provided that the directors should pay all expenses incurred in getting up and registering the company. Very few other shares were applied for: none were allotted, and the company was wound up.

W. and H. claimed in the winding-up remuneration for their services both before and after the company was formed, and the valuer claimed his charges for valuing:

Held, that, though W. and H. might not have a legal claim as to services before the formation of the company, they would have had a good equitable claim, so far as the company derived benefit from them, and would have a legal claim as to services rendered after the formation of the company. But

Held, that the concealment of the agreement as to the £1,500 constituted a fraud, and that as the shareholders had been by fraud induced to join the company, and as the company had received no benefit from the services of W. and H., they could not claim from the company remuneration for those services:

Held, that any claim which the valuer might have was against W. and H. only.

Decision of Hall, V.C., reversed.

H. E. SMITH was the owner of some ironworks at Hereford. By an agreement dated the 29th of April, 1872, he agreed with Mr. H. J. Walter, an accountant in London, and Mr. H. S. Head, a solicitor in London, that if they should succeed in forming a joint stock company for the purchase of his interest in the ironworks, according to a valuation to be made by Mr. Bramwell, C.E., the said H. E. Smith would, out of the purchase-money, pay to Walter and Head the sum of £1,500 for promotion-money. 622] It was further *provided that if the company was not formed within three months the agreement was to be void; also that the promotion-money was not to prevent Walter and Head from obtaining from the company payment for their services in getting up and registering the company. In pursuance of a previous arrangement between Mr. Bramwell and Walter and Head, Mr. Bramwell, on the 6th of May, 1872; valued the property at £14,974 10s., and

it was not contended that this valuation was unfair or excessive. On the 3d of June, 1872, a deed was executed between Smith of the one part, and Walter, as trustee on behalf of the intended company, of the other part, by which Smith agreed that he would sell the property to the company for £5,000 in fully paid-up shares and £9,974 10s. in cash. The company was not formed within the three months, but Walter introduced the matter to seven gentlemen, who agreed to join the proposed company and to take shares in it. The memorandum and articles of association were registered in December, 1872. The capital of the company was to be £100,000. The deed of the 3d of June, 1872, for the purchase of the works, was adopted. By the 21st clause it was provided that the directors should "pay all expenses incurred in getting up and registering the company;" and, by the 31st, Head was appointed the first solicitor, and Walter the secretary of the company. A prospectus was issued, but very few persons offered to subscribe for shares, so that no shares were allotted and the deposits were returned. The seven subscribers of the memorandum and directors were in fact the only shareholders.

An order was afterwards made to wind up the company. The debts and claims against the company amounted to £1,240, of which part was for disbursements by Walter and Head, and that part was not disputed. But £312 was claimed by Mr. Bramwell for his valuation; £270 by Head for professional services rendered prior and subsequent to registration; and £193 by Walter for services in a similar manner.

The liquidators opposed these claims on the ground that the agreement as to the promotion-money had not been disclosed to the seven shareholders and directors. Four of the directors asserted also that they had been assured by Head and Walter that "nothing was to be paid for per- [623] sonal services unless the company was floated. This, however, was contradicted by Head and by Walter.

The Chief Clerk of the Vice-Chancellor Hall made, with the assent of the Vice-Chancellor, a certificate allowing these claims. The liquidators took out a summons to vary the certificate, but the Vice-Chancellor refused to vary it, declining to have the questions argued by counsel, and not wishing the summons to be adjourned into court. He made no order on the summons, except that the costs were not to be paid out of the assets, but that the liquidators were to be

at liberty to appeal to the Court of Appeal without further hearing before him.

The liquidators then moved the Court of Appeal to vary the certificate.

Dickinson, Q.C., and Romer, for the liquidators: The company has admitted all the other claims, but declines to pay for these alleged services. If the shareholders had been aware of this agreement as to the £1,500, they would never have joined the company. Walter and Head were not working for the company, but for themselves; their only object was to get the £1,500, and they ought not to be paid for what they did for themselves. As to Mr. Bramwell's claim, he was employed by Head and Walter, not by the company. We have never adopted that contract, and are not bound by it.

Crossley, for the claimants: The old agreement is gone, as the company was not formed within the three months. We have never received and we do not claim the £1,500, but we are entitled to be paid for our services. Independently of the express provision in the articles of association, the person who takes the benefit of work done must pay for it. The company was not injured by the agreement as to the £1,500, which would be paid by the vendor. The company got full value, and it is admitted that the valuation was fair, if not an undervalue. As to the charges incurred after the formation of the company, these applicants have a clear right to recover them, and must have succeeded in an action [624] at law if the company had not *been wound up. As to the preliminary expenses, the promoters must pay them, even though the company is abortive: *In re Tilleard* ⁽¹⁾; *In re Kensington Station Act* ⁽²⁾.

Dickinson, in reply.

March 18. The judgment of the court (James, L.J., Mellish, L.J., and Baggallay, J.A.) was now delivered by

MELLISH, L.J., who, after stating the facts of the case, continued:

Under these circumstances, we have to determine whether Mr. Head and Mr. Walter are entitled to prove against the company in respect of their professional services, either those before or those after the registration of the company.

With respect to their professional services before the formation of the company, they would not have been entitled to maintain an action on legal grounds against the company, because the company was not in existence at the

⁽¹⁾ 3 D. J. & S., 519.

⁽²⁾ Law Rep., 20 Eq., 197.

time when the services were performed; and the 21st article of association only gives an authority to the directors to pay these costs, and does not constitute a contract to pay them as between the company and Mr. Head and Mr. Walter. We think, however, that if the company can properly be considered to have adopted and derived benefit from these services, they would in equity be bound to pay for them, and Mr. Head and Mr. Walter would be entitled to prove for them.

With respect to the services subsequent to the registration of the company, Mr. Head and Mr. Walter would be entitled to maintain an action against the company, unless the company have a defence upon some legal or equitable grounds.

The defence of the company to both claims entirely depends upon the effect of Mr. Walter and Mr. Head having concealed from the seven gentlemen who signed the memorandum of association the agreement of the 29th of April, 1872. We think it is clearly established that the company was formed by Mr. Walter and Mr. Head, in pursuance of a scheme formed between them and Smith to carry out the two agreements of the 29th of April and the 3d day [625 of June, 1872. As between Smith and Walter and Head, these two agreements obviously constituted only one agreement, but they were divided into two; in order that the part of the agreement which related to the payment of the £1,500 to Mr. Walter and Mr. Head out of the purchase-money might be concealed from the company. There can be no doubt that the concealment of this part of the agreement from the company was a fraud upon the company. It is similar to many transactions with which the court has unfortunately become familiar, and amounts to an agreement by a vendor with an agent of an intended purchaser to give him a bribe to betray the interests of his principal.

The question we have to determine is whether the fraudulent concealment is so connected with the claims of Mr. Walter and Mr. Head as to afford a ground for rejecting the proof. It was argued on behalf of Mr. Walter and Mr. Head that, as the company was not registered within three months from the 29th of April, the agreement of that date had come to an end before the formation of the company. We are satisfied, however, that, notwithstanding the three months had elapsed, the parties were still carrying out the entire scheme into which they had entered. Mr. Smith might, no doubt, if he had pleased, have abandoned the scheme upon the expiration of the three months, but he

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could not practically go on with it and yet prevent Messrs. Head and Walter from retaining the £1,500 out of the purchase-money. The fact that the company was formed proves to us that the scheme was going on.

It was next argued on behalf of Messrs. Walter and Head that, although if the company had been successfully started, and the contract with Smith had been carried out, and the £1,500 had been paid to Walter and Head, they might have been compelled to repay the £1,500, that was the only remedy which a court of equity would give in respect of a fraudulent concealment of this nature. We cannot agree with this argument. If the company had been successfully started, and it had suited the company to ratify the agreement with Smith, and go on with the business notwithstanding the concealment, it may be that their only remedy would have been to retain or recover the £1,500, and 626] that they *could not have avoided paying Walter and Head for any services from which the company had received benefit; but it does not at all follow that in the events which have happened, the company having become wholly abortive, they are bound to pay for services which have been of no value whatever to the company. It seems to us that the fraudulent concealment is directly connected with the formation of the company. The seven gentlemen who signed the memorandum of association were asked to form a company to carry out an agreement made between Smith and Walter for the sale of the ironworks to the intended company, whilst a material part of the agreement was fraudulently concealed from them. Nobody can tell what effect it would have had on their minds if they had known that Walter and Head were not the disinterested persons they pretended to be in recommending these directors to join the company. We think they are entitled to say, "We were induced by fraud on the part of Walter and Head to form the company. We were induced by fraud to assent to the articles, and it was by those articles that Walter and Head were to be paid for their services in promoting the company, and were appointed solicitor and secretary of the company." We think, therefore, that the company have a defence to the claim of Mr. Walter and Mr. Head in respect of their services in promoting the company, upon the ground that the company have received no benefit from those services, and that it would be inequitable to allow them to recover payment for those services from the company, which is entirely composed of the seven gentlemen whom they have by fraud induced to join the com-

pany; and we also think that the company have a defence to the claims of Mr. Walter and Mr. Head in respect of their services as solicitor and secretary subsequent to the formation of the company, upon the ground that the seven gentlemen, and therefore the company, were induced by fraud to appoint them solicitor and secretary of the company, and have received no benefit from their services.

We are of opinion that we are justified in holding, and that we ought to hold, that if the promoter of a company procures a company to be formed by improper and fraudulent means, and for the purpose of securing a profit to himself, which, if the company was *successful, it would [627 be unjust and inequitable to allow him to retain, and the company proves abortive and is ordered to be wound up without doing any business, the promoter cannot be allowed to prove against the company in the winding-up, either in respect of his services in forming the company, or in respect of his services as an officer of the company after the company was registered.

With regard to the claim of Mr. Bramwell, he was employed by Walter and Head to make the valuation long before the company was formed. It is, therefore, perfectly plain that at law his claim could be only against them, and he could only claim against the company on the ground that Walter and Head would be entitled to be paid by the company the cost of the valuation as part of the expenses. But they have been held not to be entitled to recover those expenses from the company, and Mr. Bramwell has no independent equity of his own against the company. He was no party to the scheme of Walter and Head, and there is no reason to doubt that his valuation of the property was perfectly *bona fide*; but if the company had never been formed his claim would have been against Walter and Head only, and under existing circumstances he must be in the same position.

All the three claims must be disallowed, and the liquidators must have their costs in the court below and of the appeal.

Solicitors for liquidators: *C. C. Ellis & Co.*

Solicitor for claimants: *S. H. Head.*

See 12 Eng. Rep., 154 note; 15 id., 281 note.

A corporation, after its organization, is not liable for the payment of debts contracted previously thereto, without an express promise to pay them after acceptance, and receipt of the benefit

of that for which they were incurred. An attempt was made to organize a corporation, under the general law of the state, with a capital stock of \$100,000. After a part of the stock was subscribed, the stockholders held a meeting and employed a superin-

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tendent to attend to work being done for the proposed corporation, which he commenced doing, but afterwards when it was ascertained that the requisite subscription of stock could not be obtained, he quit work. Most of the stockholders afterwards formed another company, with a capital stock of \$50,000, for the same purpose as the first one, and completed their organization and incorporation: Held, that, even if the first company had completed its organization, the superintendent could not have recovered against it for his services, much less against the new company: *Western, etc., v. Cousley*, 72 Ills., 531.

To establish a liability against a party as a partner for the acts of others, it must be made to appear that a copartnership was formed by express agreement, or that there was an authorization in advance and a consent to be bound by such acts as a partner, or a ratification of the acts after performance with full knowledge of all the circumstances, or some act by which an equitable estoppel has been created.

After the charter of a manufacturing corporation had expired by statutory limitation, its general agent appointed during the existence of the corporation continued to carry on the business and to contract debts; and for such a debt he gave a promissory note in the name of the corporation. In an action

against the stockholders seeking to charge them as makers of the note, on the ground that there was an implied contract of copartnership between them, it appeared that defendants, six months after the expiration of the charter, received dividends as from the earnings of the corporation, but without notice that it was not so paid, and without knowledge of the expiration of the charter; also, that credit was not given to them as partners or individuals, but to the supposed corporation. Held, that upon the expiration of the charter, the title to the corporate property vested in the trustees then in office, for the creditors and stockholders; that the defendants being merely *cestui que trust*, could not, without other evidence than proof of their interest, be charged as copartners, and that if they had received any part of the earnings of the business carried on after the corporation ceased to exist, this did not make them liable upon an action at law upon the contracts made by the agent; nor did it amount to a ratification of his acts.

Also held, that there was no legal distinction in respect to liability between a trustee and a simple stockholder, when he neither contracted the debt nor authorized another to represent him in the transaction: *Central City, etc., v. Walker*, 66 N. Y., 424, distinguishing *National Bank v. London*, 45 N. Y., 410.

[2 Chancery Division, 628.]

V.C.B., Jan. 11: C.A., March 27, 1876.

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*In re TOOTAL'S ESTATE.

HANKIN V. KILBURN.

[1870 T. 148.]

Will—Construction—Annuity—Abatement—Residue or Remainder.

A testatrix gave several life annuities and directed funds to be invested, producing an income sufficient to meet them. She bequeathed the residue of her estate, "including the fund set apart to answer the said annuities when and so soon as such annuities shall respectively cease," to J. B. T. The estate was only sufficient to pay about 5s. in the pound on the legacies and the values of the life annuities, and under an order of the court the sums apportioned to the values of the life annuities were invested, and the dividends paid to the annuitants. On the death of one of the annuitants, J. B. T. applied for payment to him of the fund of which that annuitant had been receiving the income:

Held, by Bacon, V.C., that J. T. B. was entitled :

Held, on appeal, that J. B. T. had only the ordinary rights of a residuary legatee, and could take nothing until the legacies and annuities had all been paid in full, and that his application must be dismissed.

THIS was an appeal from a decision of Vice-Chancellor Bacon.

Marion Henson Tootal made her will, dated the 28th of April, 1869, which, so far as it need be stated for the purposes of the present case, was as follows :

"I give to my brother A. D. Tootal a legacy of £500 and an annuity during his life of £50. I give to my brother Montague Robert Tootal an annuity during his life of £50. I give to my brother Herbert Kennedy Tootal an annuity during his life of £40. I give to my friend Emma Allen an annuity during her life of £25. I give to my friend Charlotte Margaret Hankin a legacy of £50 and an annuity during her life of £25. I give to my niece Mary Cobbett Kilburn a legacy of £50, and I give to my said niece the corpus or capital of the fund hereinafter directed to be set apart to answer the said annuity hereinbefore given to her uncle, the said H. K. Tootal, such corpus or capital to be paid or transferred to her when and so soon as such annuity shall cease." After giving other legacies she proceeded: "I direct my said trustees to set apart in their names sufficient funds to answer the *said respective annuities in real [629 securities in England or on [here followed description of other investments]. I also direct my said trustees to set apart and invest in their names in one or more of the securities aforesaid the sum of £1,000 to be held by them for the purpose of paying out of the income thereof any deficiency that may arise by any decrease in the income of the funds set apart to answer the said annuities, and subject thereto such sum of £1,000 and the income thereof shall form part of my residuary personal estate, and the income not required for the purpose aforesaid shall, at the expiration of each year, be paid to my residuary legatee. I give the residue of my estate both real and personal, including the fund set apart to answer the said annuities (except the fund set apart to answer the annuity hereinbefore given to my brother Herbert Kennedy Tootal), when and so soon as such annuities shall respectively cease, to my brother John Broadhurst Tootal, his heirs, executors, administrators, and assigns respectively, absolutely."

The estate was administered in this suit, and the residue, after payment of costs, was little more than enough to pay

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5s. in the pound on the legacies and the values of the life annuities.

By an order, dated the 22d of July, 1872, made in Chambers on further consideration, it was ordered that the residue should be apportioned among the legatees and annuitants in proportion to their legacies and annuities respectively, and the amounts certified, and for the purpose of such apportionment it was ordered that the values of the abated annuities respectively should be ascertained as at the death of the testatrix, and that the amount of legacy duty should be ascertained, distinguishing how much was payable in respect of each legacy and annuity, and that the total amount of such duty should be transferred to the account of the Receiver-General of Inland Revenue, and that out of the ultimate residue the amounts which should be apportioned to the legatees respectively should be paid to them respectively, or to their respective legal personal representatives. "And that thereout also so much thereof as shall be apportioned in respect of the said annuities respectively (the respective amounts thereof to be verified by affidavit) be laid out in the purchase of Bank £3 per Cent. Annuities in the name of the Accountant-General, in trust in the said matter and cause, 'The account of 630] Alfred Dowley Tootal's annuity,' 'The account *of Montague Robert Tootal's annuity,' &c.; and that the interest to accrue during the lives of the several annuitants, A. D. Tootal, M. R. Tootal, E. Allan, and C. M. Hankin, be, until further order, paid to the said A. D. Tootal, M. R. Tootal, &c., or to their respective legal personal representatives."

An apportionment was accordingly made taking the present value of each annuity at the death of the testatrix, according to the age of the annuitant, and the sums thus apportioned to the annuities were invested pursuant to the order. The fund thus set apart in respect of Montague Robert Tootal's annuity was the sum of £218 3s. 2d. consols.

In January, 1875, Montague Robert Tootal died, and John Broadhurst Tootal, the residuary legatee, thereupon applied to have this fund paid out to him. The summons was adjourned into court, and came on to be heard before Vice-Chancellor Bacon on the 11th of January, 1876.

Kay, Q.C., and *Watson*, for J. B. Tootal, referred to *Bethune v. Kennedy* ('), *Mills v. Brown* ('), and *Baker v. Baker* (').

Sir *H. Jackson*, Q.C., and *Procter*, contra, referred to

(') 1 My. & Cr., 114.

(') 21 Beav., 1.

(') 6 H. L. C., 616.

Howe v. Earl of Dartmouth (1), *Farmer v. Mills* (2), and *In re Lyne's Estate* (3).

BACON, V.C.: The first question presented to me is on the construction of the will. The words of the will are very plain. There is a direction to the trustees to invest and secure a sum of money sufficient to pay annuities to persons named. Nothing can be more specific in its nature than that direction. If the testatrix had had a certain sum sufficient for the purpose standing in her name in the books of the Bank of England, and had directed the requisite portion of that sum to be invested by trustees to answer the annuities, it could not have been more specific. The testatrix contemplates the possibility of a decrease of income of the specific sum so set apart, and she provides also that [631] if that should not be required for the purpose of making up the deficiency, or not the whole of it, that that should sink into the residue, and then she disposes of the residue. And the residue is in general terms, but the generality is circumscribed, discriminated and distinguished in the plainest terms that can be conceived by the expression she uses, "including the trust funds which I have set apart or directed my trustees to set apart for the purpose of satisfying the annuities." As matter of construction, if the estate had been sufficient, the argument could not have been sustained for a moment that the particular funds to satisfy the annuities were not specific. They are earmarked, distinguished and stamped with a character that cannot be effaced from them. But then this happens, the testatrix has miscalculated the value of her estate, and it becomes necessary to file a bill in this court to have the estate administered, but not without construing the will. The court does not administer the estate with one hand, and construe the will with another hand at another time. The construction of the will must have been before the court when the decree and order on further consideration was made, and although there is no word in it expressing a declaration of the court as to the rights of the parties, there are words which plainly show that the court, in exercise of its authority, determines the rights of every party interested, because an abatement being necessary, the court treats (as is done indeed in *Farmer v. Mills* (2)), the whole estate as one thing, and liable to satisfy the several bequests and specific legacies; though they are in their nature the gifts of those annuities, the court makes no distinction for the purpose of apportioning between the

(1) 7 Ves., 137.

(2) Law Rep., 8 Eq., 482.

(3) 4 Russ., 86.

specific annuities and the particular legacies, and it directs, having first provided for the payment of the costs and all other requisite payments and dealings with a clear estate, an apportionment between the legatees properly so called and the annuitants, who are also legatees in proportion to their several interests as described by the will, and it directs that while the annuities should subsist the income of the funds apportioned should be paid to those annuitants, and there it stops, and there is an end of it. If it had been the intention of the court to construe the will in the manner [632] it *has been suggested would have been its duty, it would have reserved the rights of the legatees and other persons to apply after the death of the annuitants, but there is no such word or meaning in the will. What is done is done once for all. The rights of the annuitants are ascertained, the rights of the legatees are satisfied. If after the lives of the annuitants those payments which are directed are brought to an end, any other persons have a right to apply. Let them apply. It is impossible, in my opinion, to read the will and to doubt the construction; and if there were any doubt upon the subject, I think that is covered by the decree on further consideration. The court is open to no such reproach as would otherwise be directed against it if it had left a question like this which is now raised to be decided on some future occasion. The cases that have been referred to (*Mills v. Brown* (*) and *Bethune v. Kennedy* (†)) are plain and distinct authorities that a gift is not less specific because it is mixed up in the residue, and the words which the testatrix uses here, having first provided for the specific apportionment and security of the fund to produce the annuity, are: "I give the residue of my estate, including the fund set apart to answer the said annuities." Upon the whole, I entertain no kind of doubt, either upon the construction of the will or on the effect and operation of the order on further directions, that the residuary legatee is entitled to the fund which, by the decree on further consideration, had been set apart to answer the annuity of the gentleman who has died.

The representative of the deceased annuitant, Montague R. Tootal, appealed, and the appeal came on to be heard on the 27th of March, 1876.

Sir *H. Jackson*, Q.C., and *Procter*, for the appellant: The Vice-Chancellor relied on *Farmer v. Mills* (‡), but that case is really an authority in our favor. The residuary

(†) 21 Beav., 1.

(*) 1 My. & Cr., 114.

(‡) 4 Russ., 86.

legatee cannot take anything till the annuitant has been paid his annuity in full. The words "including the fund," &c., are merely words added *ex abundanti cautela*, and cannot be held to make the gift *to Montague Tootal [633 a gift of a life interest in a fund, with remainder over. According to that view, if the annuitant had died in the life of the testatrix, the residuary legatee could have claimed an apportionment as against other legatees; whereas it is clear that the directions to set apart the fund would fail of effect. In *Eales v. Drake* (') the legatees had not so strong a case as ours.

Kay, Q.C., and *Watson*, for the residuary legatee: On the terms of this will we say that nothing is given to the annuitant but a life interest in a particular fund, and that he cannot claim anything more, the fund being given in remainder to the residuary legatee: *Croly v. Weld* ('); *Bethune v. Kennedy* ('); *Mills v. Brown* ('); *Baker v. Baker* ('); *Scott v. Salmond* (').

JAMES, L.J.: I think this case free from difficulty. The order on further consideration, in the first place, rightly directed the life annuities to be valued. That went on the assumption that there was no case of gift over, and so is unfavorable to the respondent. A pecuniary legatee, or an annuitant, must be paid in preference to the residuary legatee, who can take nothing till all the legatees and annuitants have been paid in full. It is true that a gift may be so worded as to make the annuitant tenant for life of a fund, the corpus being given over on his decease; but it is impossible to put such a construction on a gift of the residue, "including the fund set apart to answer the annuity." To say that what is included in the residue is something else than residue is contradicting the plain terms of the will. The residuary legatee is entitled to nothing till the annuitants have been paid in full. This summons, therefore, must be dismissed. It will have to be considered what ought to be done as to the order on further consideration, which is erroneous in valuing Herbert Tootal's annuity *simply as a life annuity, without any regard to the [634 gift over of the corpus set apart to produce it.

MELLISH, L.J.: The only question is whether, on the death of the annuitants, the funds set apart for securing their annuities fall into the residue, or are given to the re-

(') 1 Ch. D., 217.

(') 3 D. M. & G., 993.

(') 1 My. & Cr., 114.

(') 21 Beav., 1.

(') 6 H. L. C., 616, 622.

(') 1 My. & K., 363.

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siduary legatee as pecuniary legacies. The testatrix says plainly that they are included in the residue.

BAGGALLAY, J.A.: I agree, and will only add that in *Baker v. Baker* (1) the Lord Chancellor went on the difference between a residuary legatee and a remainderman.

Solicitors: *R. Miller & Wiggins; Henry P. Cobb.*

(1) 6 H. L. C., 616.

[2 Chancery Division, 644.]

M.R., March 11: C.A., March 29, 31, 1876.

644] *ANDERSON V. BANK OF BRITISH COLUMBIA.

[1875 A. 107.]

Production of Documents—Privileged Communication—Letter from Agent to Principal.

A bill was filed against a banking company to compel them to replace a sum of money alleged to have been improperly transferred by them from one account to another at their branch bank in Oregon. Before the bill was filed, but after litigation had become highly probable, the manager in London telegraphed to the manager in Oregon to send full particulars of the whole transaction. On an application by the plaintiffs in the suit for production of documents, the bank resisted production of the letter sent in answer, as being privileged:

Held (affirming the decision of the Master of the Rolls), that the letter was not privileged, and must be produced.

Ross v. Gibbs (1) explained.

Under the Judicature Acts the right to discovery is regulated by the rules previously existing in the Court of Chancery.

THIS was an appeal by the Bank of British Columbia and H. E. Ransom, their manager, from an order of the Master of the Rolls directing production of a letter dated the 16th of November, 1874.

The general nature of the case made by the bill filed on the 7th of October, 1875, was as follows: That the plaintiffs, Anderson & Co., of London, and William Guild & Co., of London, and the defendants, Laidlaw & Gate, of Portland in Oregon, were jointly interested in an adventure for bringing wheat from America to Europe; that the British Bank of Columbia was an English bank, having a branch at Portland, in Columbia, and acted as the banker of Laidlaw & Gate; that moneys belonging to the adventure were placed to a separate account, "Laidlaw & Gate, London account," with the Portland branch, and that the bank knew the nature of the title to these moneys; that Laidlaw & Gate, being indebted to the bank, transferred in December, 1873, the balance to their own private account, in part satisfaction

(1) Law Rep., 8 Eq., 522.

of the debt, and also about the same time gave the bank a security on a cargo of wheat belonging and known by the bank to belong to the adventure, which cargo was shipped on board the *Melancthon*, and afterwards *sold by [645 the bank; that the adventure resulted in a loss, and that the plaintiffs, as between themselves and *Laidlaw & Gate*, were entitled to the moneys thus received by the bank, amounting to £4,328. The bill prayed that the transfer to the private account of *Laidlaw & Gate*, and the mortgage of the wheat, might be declared fraudulent and void as against the plaintiffs, and for repayment by the bank.

On the 11th of November, 1874, Mr. Ransom, as manager of the bank, had received from the plaintiff's solicitors a letter demanding repayment of the above sum, which letter concluded as follows: "We understand that this matter has already been the subject of discussion at your board, and we shall be obliged by your informing us whether it is the intention of the bank to repay the moneys to our clients, or whether they are to be driven to litigation to obtain them; and, in the latter case, we must ask you to refer us to your solicitors, to whom we may send process in the suit which we are instructed to commence." About the same time the plaintiff *Anderson* had an interview with *Ransom* on the subject. *Ransom* deposed as follows: "On perusing the above letter, and considering what had passed at the interview with the plaintiff *A. G. Anderson*, I observed that litigation was imminent, and I felt that it was essential that the bank should have the benefit of legal advice, and that for that purpose there should be obtained from the other side the full particulars of all the facts and circumstances of the case likely to be required by the solicitor of the bank. I determined, therefore, at once to telegraph to Mr. *Russell* instructions for full particulars, and at the same time to request the attendance of the solicitor of the bank at the next meeting of the court of directors."

Mr. *Ransom*, accordingly, on the 14th of November, 1874, telegraphed to Mr. *Russell*, the branch manager at *Portland*, as follows:—

"Claims referred to letter 18 Sept. made for 25,000 dollars. Send by letter fullest particulars whole transactions, especially cargo *Melancthon* and copy of account."

The letter of the 16th of November, 1874, to which the present question related, was the letter written by Mr. *Russell*, in pursuance *of the above telegram, to Mr. [646 *Ransom*, as general manager of the bank.

The usual order having been made for an affidavit of documents, Ransom and another officer of the bank made an affidavit, the second part of the schedule to which contained an entry of this letter and a number of other letters and documents. The deponents objected to produce the documents in the second part of the schedule, "on the ground that they are correspondence between the defendants, the Bank of British Columbia, and their solicitors or agents, in reference to the subject of this suit, and documents prepared by their solicitors exclusively for the purposes of this suit, or with reference thereto, and are privileged."

A summons for production of this letter was adjourned into court. The evidence of Ransom was given, to the effect stated above, as to the communications with him and his sending the telegram. The summons came on to be heard before the Master of the Rolls on the 11th of March, 1876.

Chitty, Q.C., and *Kekewich*, for the bank: We say that a defendant is entitled to claim privilege in respect of information obtained after a claim has been made by the plaintiff, relating to threatened litigation, for the purpose of conducting the defence, even although it may not be obtained directly or indirectly through a solicitor or professional agent: also in respect of information obtained for the purpose of being communicated to a solicitor or professional adviser; and, at all events, that privilege may be claimed where such information is communicated confidentially. That such is the state of the law is shown by *Greenough v. Gaskell* (1), *Reid v. Langlois* (2), *Curling v. Perring* (3), *Steele v. Stewart* (4), *Lafone v. Falkland Islands Company* (5), *Ross v. Gibbs* (6), *Woolley v. North London Railway Company* (7), *Cossey v. London, Brighton and South Coast Railway Company* (8), *Skinner v. Great North-647] ern Railway Company* (9), **Chartered Bank of India v. Rich* (10). Here the letter in question was written in answer to the inquiries of the manager, and with a view to its being submitted to the solicitor of the bank, and is privileged.

Laing, for the plaintiffs, was not called upon.

JESSEL, M.R.: I am very much obliged to Mr. Kekewich for calling my attention in Chambers to the common law authorities. It is certain that they are cases that we ought to be acquainted with, and we ought to know how the au-

(1) 1 My. & K., 98.

(2) 1 Mac. & G., 627.

(3) 2 My. & K., 380.

(4) 1 Ph., 471.

(5) 4 K. & J., 34.

(6) Law Rep., 8 Eq., 522.

(7) Ibid., 4 C. P., 602.

(8) Ibid., 5 C. P., 146.

(9) Law Rep., 9 Ex., 298.

(10) 4 B. & S., 33; 32 L. J. (Q.B.), 300.

thorities stand. I have no doubt that this document is not privileged.

The facts of the case are few and simple, and very well put. Some gentlemen considered that an account which they opened at a branch bank at Oregon had been improperly dealt with to their disadvantage, and they made a claim upon the Bank of British Columbia, who have a head office in London, and although they did not commence a suit, they sent a demand which looked very much like a suit if it was not complied with. Thereupon the general manager in London sent to the agent of the bank at Oregon for an explanation of what he had been doing with this account, and that is all. He sends for an explanation by telegram, of which the following is a copy: "Claims referred to letter, 18th Sept., made for 25,000 dollars. Send by letter fullest particulars whole transactions, especially cargo Melanethon and copy of account." In answer to that telegram the letter is written which is sought to be protected, the letter containing the "fullest particulars," and there is not another word which appears to me material with respect to the transaction. The affidavit goes on to state this, that when he first saw the letter of the plaintiff he observed—whatever "observed" may mean—"that litigation was imminent, and I felt it was essential that the bank should have the benefit of legal advice, and that for that purpose there should be obtained from the other side"—that is, from Oregon—"the full particulars of all the facts and circumstances of the case likely to be required by the solicitor of the bank. I determined, therefore, *at once to telegraph to Mr. Russell"—that [648 is, the agent—"instructions for full particulars, and at the same time to request the attendance of the solicitor of the bank at the next meeting of the court of directors;" and, accordingly, he sent a telegram, and the solicitor attended the court of directors. Now, there is not a syllable there which shows that any communication, direct or indirect, expressed or implied, was made to the agent to the effect that his communication was to be a confidential one for the purpose of being submitted to the professional man—that is, the solicitor—for advice. If it had been so, I apprehend that it would have been protected upon principles well understood. If you ask your agent to draw out a case for the opinion of your solicitor, or for the opinion of your counsel, that is a confidential communication made for that purpose. Here there is nothing of the sort. Nor is it suggested or alleged that, without being requested, the agent did make the communication with the object of its being laid before

the solicitor for advice. He therefore did not make it as a confidential communication in any other sense than that in which every communication from an agent to his principal, or from a sub-agent to the chief agent of the principal, is confidential. Every such communication, no doubt, is in a sense confidential, but not in the sense in which we call a communication to a professional man confidential. This communication, then, as regards the sender, was not made or sent for the purpose of being laid before a professional adviser, nor was there any intimation of such purpose sent by the person who required the communication. All that you have got is a statement of the person who sent the telegram as to the state of his feelings at a particular time, which is not sufficient for the purpose of the point I have to determine. I therefore feel no difficulty whatever in saying that this clearly was not a confidential communication made within the rule which protects confidential communications from discovery as regards the other side.

What is the rule, and what is the meaning of the rule? The meaning of the rule is, I understand, truly laid down by Lord Brougham in the case of *Greenough v. Gaskell* (*), and is thoroughly well explained, if I may use the phrase in [649] reference *to so great a judge as Lord Cottenham, in the case of *Reid v. Langlois* (*), followed in every case in equity, not excepting the case before the Vice-Chancellor Stuart, in which a *dictum* has been strained to an extent which, if the Vice-Chancellor's attention had been drawn to it, I think, he would not have thought warranted. The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule,

(*) 1 My. & K., 98.

(*) 1 Mac. & G., 627.

Now, as to the extent of the rule. It goes not merely to a communication made to the professional agent himself by the client directly, it goes to all communications made by the client to the solicitor through intermediate agents, and he is not bound to write letters through the post, or to go himself personally to see the solicitor; he may employ a third person to write the letter, or he may send the letters through a messenger, or he may give a verbal message to a messenger, and ask him to deliver it to the solicitor, with a view to his prosecuting his claim, or of substantiating his defence.

Again, the solicitor's acts must be protected for the use of the client. The solicitor requires further information, and says, I will obtain it from a third person. That is confidential. It is obtained by him as solicitor for the purpose of the litigation, and it must be protected upon the same ground, otherwise it would be dangerous, if not impossible, to employ a solicitor. You cannot ask *him what [650 the information he obtained was. It may be information simply for the purpose of knowing whether he ought to defend or prosecute the action, but it may be also obtained in the shape of collecting evidence for the purpose of such prosecution or defence. All that, therefore, is privileged.

Then the rule goes a step further. The solicitor is not bound any more than the client to do this work himself. He is not bound either to collect information or to collect testimony. He may employ his clerks or other agents to do it for him, and upon the same principle as the information acquired by himself directly is protected, so the information acquired by a clerk or agent employed by him is equally protected. But then the cases go still a step further. Suppose the information required is in a foreign country, where neither the solicitor nor his clerk nor an ordinary agent can obtain it, he may request the client to obtain it himself, and then the information so obtained by the client at the request or under the advice of the solicitor is in a sense obtained by the agent of the solicitor, although it is a very odd way of expressing it. It is turning the client, so to say, into the agent of the solicitor for the purpose of obtaining information; but it is clearly within the rule of privilege. So far as I understand, the cases in equity go no further. To show that I am right in what I am stating it will perhaps be necessary to say a word or two as to the authorities.

In *Reid v. Langlois* (¹) Lord Cottenham says this (²):

(¹) 1 Mac. & G., 627.

(²) 1 Mac. & G., 638.

"Now the argument turned on this, that although a party may communicate with his legal adviser, and that production of the documents arising out of that communication will be protected, yet if the message is sent through a third person in writing it is not protected. It is obvious that no such distinction as this can be maintained; the object is to protect the party who wishes to take the advice of professional men"—by which he means members of the legal profession. Our law has not extended that privilege, as some foreign laws have, to the medical profession, or to the sacerdotal profession. We know that in some foreign countries communications made to a medical man are privileged, upon the ground that it is as desirable that a man shall be 651] perfectly free in his communication with *his medical man as that he shall be free in his communications with his lawyer. That has not been recognized in this country. Again, in foreign countries where the Roman Catholic faith prevails, it is considered that the same principles ought to be extended to the confessional, and that it is desirable that a man should not be hampered in going to confession by the thought that either he or his priest may be compelled to disclose in a court of justice the substance of what passed in such communication. This, again, whether it is rational or irrational, is not recognized by our law. When Lord Cottenham says "professional men" he means members of the legal profession and nothing else—"and he would be prevented from taking such advice if there was the hazard of having it revealed on entering into a contest with an opponent." Then he goes on (1): "One, however, of the documents in question is a letter from the defendant to Messrs. Robinson & Brooking, the agents, and there is no statement that it was communicated or sent to them for the purpose of being communicated to the solicitor. This, therefore, cannot be protected."

The case of *Steele v. Stewart* (2) has also been referred to—again a decision of a Lord Chancellor, Lord Lyndhurst. He says this, after referring to statements that the letters in question were written by a master of a ship to the defendant Stewart, who lived at Calcutta, and his solicitors, and that they were written by the master to the defendant and his solicitors while he was in Calcutta acting by their direction and as their agent in procuring evidence in support of an action: "It does not appear to me that there is any inconsistency in these statements. He might have been sent out by the

(1) 1 Mac. & G., 639.

(2) 1 Ph. 471, 474.

defendant for the purpose of collecting evidence on behalf of the defendant at the suggestion and by the advice of the defendant's solicitors, and might, in collecting such evidence, have acted under the direction and as the agent of the solicitors. The single question, therefore, is, whether letters written under these circumstances are privileged communications." The case came to be considered before Lord Hatherley when Vice-Chancellor Wood; this is only the Vice-Chancellor's decision, which is not so binding upon me as those of the Lord Chancellors, still it is a decision which has been universally recognized and followed. *It [652 took place in the year 1857, and I, for one, will not depart from it. In *Lafone v. Falkland Islands Co.* (*) he says, after quoting the case of *Steele v. Stewart*(?): "It seems to me that the principle there laid down by Lord Lyndhurst is that the true test is not whether the person who is at a distance and communicates the information in question is the agent of the solicitor and sent out by the solicitor, or the agent of the defendant and sent out by him; as Lord Lyndhurst there says, he may have been sent out by the defendant, and yet, in collecting the information, he may have acted under the direction and as the agent of the solicitor;"—as I said before, that is rather a refined sense—"but the true test is, whether such person, in transmitting that information, was discharging a duty which properly devolved upon the solicitor, and which would have been performed by the solicitor if the circumstances of the case had admitted of his performing it in person;" in other words, if a solicitor asks the client to send somebody to collect information, it is the same thing as if the solicitor himself had written to a person in foreign parts asking for information.

Now, on the other hand, I have been referred first of all to a case before Vice-Chancellor Stuart of *Ross v. Gibbs* (*). The defendant had despatched a Mr. Gibbs, a non-professional person, to Spain, to collect evidence. The privilege as claimed was this: "a bundle of letters from Joseph Hucks Gibbs, the special agent of Messrs. Gibbs & Son, sent by them to Spain to consult with their legal advisers there, and to report thereon, and to obtain evidence for the said Messrs. Gibbs & Son in this suit, and in the suit of *Gibbs v. Ross*, written by the said J. H. Gibbs to Messrs. Gibbs & Son." As I understand, the Vice-Chancellor considered that Gibbs was sent out to consult their legal advisers and to act under their direction in collecting evidence,

(*) 4 K. & J., 36.

(?) 1 Ph., 471.

(?) Law Rep., 8 Eq., 522, 524.

and if so, the point was the same as that decided in *Steele v. Stewart* and *Lafone v. Falkland Islands Company* ('). This is not stated quite so distinctly as it might have been, but it is to be collected from what the Vice-Chancellor said. He says: "It is contended that unless the agent's communications are with a solicitor they are not privileged, but 653] that *notion is not countenanced by any principle or by any authority, except a dictum of Lord Brougham in the case of *Greenough v. Gaskell*" ('). He is there referring to the principle that the foreign agent employed by the solicitor may communicate to the client or to the solicitor, and that such communications are privileged, being the result of the solicitor's advice and direction. The fact that the agent you employ is in fact employed at the request and direction of your solicitor to obtain information for him brings a case within the rule. Then he says: "The privilege is that of the client, and information procured through an agent relative to litigation, and with a view to it, is as much protected on principle as if it was procured through a solicitor." That refers to information obtained under the advice and direction of the solicitor, for the Vice-Chancellor goes on to say: "In the case of *Reid v. Langlois* ('), Lord Cottenham, referring to the argument that the necessity of employing a third party can alone justify the privilege, says, 'There is no good reason, and I believe no authority, for a rule of this kind.'" Now you find Lord Cottenham expressly saying that it is the communications of a third person employed to communicate to the solicitor that are privileged. Therefore it is clear that when you see what the Vice-Chancellor is speaking of, and when you find him referring to *Reid v. Langlois*, he is not laying down any new law, but following simply the law already laid down. Then he goes on to say: "Communications with a professional, or even an unprofessional agent, in anticipation of the litigation, and with a view to the prosecution of a claim or a defence against a claim to the matter in dispute, being confidential, are privileged; communications of plaintiffs and defendants with their own professional advisers as to their own rights or title to the subject-matter of the suit, though made before the suit or before it was anticipated, are privileged." But the words "being confidential" govern the whole sentence, and confine it to confidential communications with a professional adviser; and in the next sentence he uses the term "their own professional advisers." I think the Vice-Chancellor, therefore, neither decided nor intended to decide

(') 4 K. & J., 34.

(') 1 My. & K., 98.

(') 1 Mac. & G., 627.

anything beyond what had been previously decided by the authorities which were binding upon him.

*Then, on the other hand, I have been referred to [654 some decisions by judges of the common law courts on this question. I do not intend to go through them in detail, for this reason: they all proceeded, as I understand, not upon the simple rule of equity, as to which there seems to have been some misunderstanding in the minds of those learned judges—I say it with great respect—but upon the powers conferred on the judges by the Common Law Procedure Act. It was put in one of the cases especially by Mr. Justice Blackburn, that he did not consider, or they did not consider, that the rules of equity were binding upon them, but that they had a different power and a different discretion under the Common Law Procedure Act, and were entitled, if they thought fit, not to go so far as the courts of equity were in the habit of going. Similar statements appear in the judgment of Lord Chief Justice Cockburn in one of the cases. If that were so, those cases are now no authorities at all, because since the Judicature Act it must be taken to be conclusively settled by the Legislature that where there is any conflict between the rules of law and the rules of equity, the rules of equity are to prevail; and, consequently, even a tribunal composed of the same judges as men, though not the same judges in their character as judges, since they are now judges of the High Court, will be no longer governed by the clauses of the Common Law Procedure Act, if those clauses conflict with the rules of equity, but will be governed by the rules of equity; and it is for that purpose that I have referred merely to the equity decisions as my guide in disposing of this case.

I am, therefore, clearly of opinion that this document is not privileged.

The bank and their manager appealed from this decision, and the appeal came on to be heard on the 29th of March, 1876.

Chitty, Q.C., and *Kekewich*, for the appellants: We contend that this letter is privileged as being a confidential communication to enable the directors to obtain legal advice.

[MELLISH, L.J.: I apprehend that a letter written by an agent who was getting up evidence to be used at the trial would be privileged; but this is not like that.]

*If the letter had been written by Russell spon- [655 taneously, the case would have been different; but he wrote

it in answer to a telegram referring to the claim that had been made. If the information had been asked for expressly for the purpose of being laid before the solicitor, it would have been privileged: *Lafone v. Falkland Islands Company* (') and all information obtained for the purpose of resisting threatened litigation stands on the same footing: *Greenough v. Gaskell* ('); *Reid v. Langlois* ('); *Ross v. Gibbs* ('); *Hooper v. Gumm* ('); *Cossey v. London, Brighton and South Coast Railway Company* ('); *Chartered Bank of India v. Rich* ('); *Skinner v. Great Northern Railway Company* ('); *Fenner v. London and South Eastern Railway Company* ('); *Baker v. London and South-western Railway Company* ('); *English v. Tottie* ('); *McCorquodale v. Bell* ('). If Ransom had first gone to the solicitor, and the solicitor had said, "I cannot advise you till you have got further information from Oregon," and Ransom had then written to Oregon, he would have been acting as the solicitor's clerk, and the reply would, according to the authorities, have been privileged. That here the telegram was sent just before Ransom saw the solicitor makes no substantial distinction.

[MELLISH, L.J.: The object here was, not to obtain evidence, but to learn what the facts were, in order to know whether the claim should be resisted. It seems to be an extension of the rule as to privileged communications to apply it to such a case.]

Hastings, Q.C., and *Laing*, for the plaintiff, were not called upon.

JAMES, L.J.: Notwithstanding the great length of the arguments addressed to us, and the number of cases cited, I think that this is one of the clearest and plainest cases that [656] have ever come before the court; *and according to all the cases decided ever since I have known the court, and everything I have ever read about the practice of the court, I think that this is a document which ought to be produced. The old rule was that every document in the possession of a party must be produced if it was material or relevant to the cause, unless it was covered by some established privilege. It was established that communications that had passed directly or indirectly between a man and his solicitor were privileged, and the privilege extended no further. It is now

(1) 4 K. & J., 34.

(2) 1 My. & K., 98.

(3) 1 Mac. & G., 627, 638.

(4) Law Rep., 8 Eq., 522.

(5) 2 J. & H., 602.

(6) Law Rep., 5 C. P., 146.

(7) 4 B. & S., 73.

(8) Law Rep., 9 Ex., 298.

(9) Law Rep., 7 Q. B., 767.

(10) Law Rep., 3 Q. B., 91.

(11) 1 Q. B. D., 141.

(12) 24 W. R., 399.

contended that that rule was entirely altered by an expression of the Vice-Chancellor Stuart in the case of *Ross v. Gibbs* (¹). I am quite sure that the Vice-Chancellor did not intend, by a mere casual and hasty generalization not called for at all by the facts of the case, to depart from the whole tradition and course of this court with respect to the production of documents. If the rule had been as was supposed to be laid down in that case, all that is said in text books by learned authors with regard to the origin of the principle, and with regard to the justification of the privilege—all that is said about its being confined to lawyers and not extending to doctors and priests—all that has been said by learned judges in Chancery, in the particular circumstances of the cases that came before them, to show how they might be brought within that general principle—the whole of that would be, to my mind, puerile nonsense if there had been that law which is supposed to have been laid down, that any communication made by a person with a view to litigation, whoever the person is, must be protected. As to the cases at law, it is not necessary to go through them, as they seem to have been brought, apparently now at least, very much into conformity with the principle of the cases in equity, and it is needless to go through them for the purpose of seeing whether in each of them, if the same state of circumstances came before the court, the same decision would be arrived at. Looking at the dicta and the judgments cited, they might require to be fully considered, but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief. But that seems *to me to have no application [657 whatever to a communication between a principal and his agent in the matter of the agency, giving information of the facts and circumstances of the very transaction which is the subject-matter of the litigation. Such a communication is, above all others, the very thing which ought to be produced. Look at the circumstances of the present case. A man makes a claim against a bank in London, the bank in London not having all the facts in their knowledge, send out to their agent who transacted the business a telegram to this effect, "Give us the fullest information that you have of all the facts and circumstances of the case, all about the shipping document, and everything of the kind connected with it." That is exactly what they ought to do. It is the

(¹) Law Rep., 8 Eq., 522.

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duty of a man, in the ordinary course of business, to do it, and it is not necessarily connected with the litigation either actually commenced or expected. It is the information of the agent, and the principal ought to know what the agent knows. The knowledge of the agent in the matter of the agency is, or ought to be, the knowledge of the principal; and even if, after the bill had been filed, the defendant had said, when asked for discovery, "I do not know, all the knowledge is in the possession of my agent in Oregon," this court would say, "That is no answer; it is your duty in making the discovery to use your best efforts *bona fide* to obtain all the information that your agent can give you, and, whether it is before or after litigation, you ought to write to him, if necessary, and get from him the information; and if you get the information, you must tell us what it is, so that we may know the exact facts and circumstances of the case." That being so, it is impossible to say that discovery of a document of this kind can be refused. The agent has sent to the principal the account, or we must assume that what the agent has sent in answer to the telegram is a statement of what took place between him and the other party. The other party says, "You have got that statement of facts, produce it; it shows what the facts are within your own knowledge, and is the best evidence of what you know as to what took place."

I am of opinion, therefore, upon the plainest principles on which discovery is given in this court, this letter ought to be produced.

658] *MELLISH, L.J.: I am of the same opinion. The question depends upon the right to discovery, and although Rule 11 of Order xxxi of the Rules of Court, 1875, as to what documents ought to be discovered differs very little from a similar provision in the Common Law Procedure Act, yet, having regard to the general rule that the principles of equity are to prevail, there can be no doubt that the rules previously existing respecting discovery in the Court of Chancery are binding now upon all the courts.

Then as to the question that we have to decide in this case—and I do not at all wish to go beyond what is necessary for the decision of the particular case before us—the question we have to decide is, whether a letter by a mercantile agent to his principal giving information respecting what the agent had actually done for and on account of the principal is to be privileged because it is sent in compliance with the request of the principal given after the principal has been threatened with litigation respecting the matter on

which he requires information. I am clearly of opinion that such a communication is not privileged. To be privileged it must come within one of two classes of privilege, namely, that a man is not bound to disclose confidential communications made between him and his solicitor, directly, or through an agent who is to communicate them to the solicitor; or, secondly, that he is not bound to communicate evidence which he has obtained for the purpose of litigation. Now, in determining to what extent the latter privilege goes, and whether it is confined to cases where a solicitor is employed, or extends to cases where a man acts as his own solicitor, some very nice questions may arise, particularly when the evidence is not obtained for the direct purpose of being given in the action, but is obtained before the action is commenced or before the defence is pleaded, in order that the party who seeks it may obtain information for the purpose of determining whether he will defend the action, or whether he will commence an action. Now if the information is really and simply information obtained respecting the evidence which could be given by a person who is to be a witness, I do not think it is necessary to give any opinion on the present occasion whether that would be privileged *or not. Supposing a collision had taken place [659 either at sea or on land, and a man before he determines whether he will bring an action or defend an action writes to a person and says, "Get me an account from all the passengers and crew what each man can say respecting this transaction, write it down as accurately as you can, and send it up to me"—it might be that that would be privileged just as much if he sent and asked for it before he determined whether he would bring an action or defend an action as it would be if it was sent after the action was commenced, and he wished to obtain information as to what evidence such persons would probably give. He may say, "If the other side want the information, they may go to the same persons and ask them themselves what evidence they will give; and if they will only inform one side what the evidence may be and not the other, that is his misfortune." As a general rule, it may be he is not bound to give the discovery respecting that, but I cannot think that that ought to be held to apply to information which a principal asks his agent to give respecting the matters which the agent has done for and on account of the principal. That is information respecting matters which in point of law are the acts of the principal himself, and it is information respecting matters as to which the knowledge of the agent is the knowledge of the

principal. In point of law, the principal is to be deemed to have known the facts before he has actually got personal information about them. I cannot but think that, as you are entitled to ask the principal what he knows respecting those facts, you must necessarily be entitled to the information which his agent has sent respecting them. As I have observed during the course of the argument, I cannot conceive that there is any distinction between written communications by an agent to his principal, and verbal communications by an agent to his principal; and for the defendant in this case to refuse to produce this letter, is, it seems to me, the same thing as if a principal, when asked a question respecting anything which had happened in his own office as to some matter of business which had not been actually transacted by himself, was to say in answer, "I do not know personally how this was done; the only information I have respecting it is *the information I have obtained from my clerks and servants, and my clerks and servants gave me that information in consequence of questions which I put to them after I was threatened with an action." It cannot for a moment be supposed that such an answer would be a sufficient excuse for not giving the discovery asked for. It appears to me, even if we had a discretion to say what was just and right, that it would be a decision very detrimental to the purposes of justice to say that such communications were privileged. In fact, practically, we should be depriving a man of the benefit of discovery in a great many cases. So far from saying that this letter ought to be privileged because it comes from the other side of the world, that is really a reason why it is more important that it should be discovered. Anybody who is at all aware of the practice at common law in mercantile cases must know the extraordinary inconvenience, delay, and expense which take place on account of commissions having to be sent abroad to prove facts and obtain evidence respecting which there is no real doubt and no real dispute whatever, and the necessity for sending out such commissions would be enormously increased if we were to hold that principals are not to be bound to discover the information which they have received from their agents. If both parties are bound to discover the information they have respectively received from their agents, then, in all human probability, in a great many cases the facts will be perfectly ascertained without any difficulty, and nothing will remain but the question of law as to whether the plaintiff is or is not

under the circumstances entitled to recover from the defendants.

The question before us is a strong instance of this. Here is a transaction that took place with the Bank of British Columbia by their agent out in Oregon. Of course the person, whoever he may be, who may be made a defendant for the purpose of discovery, will not know of his own knowledge what took place out in Oregon. The books are all out in Oregon, and if it is necessary to wait until somebody goes and examines the books in Oregon, nobody can tell what the extent of the delay and expense may be. If the matters had happened in London, so that you could bring before the court the man who knew the facts in London, and who was the person *to give the discovery, there [661] would not be the slightest doubt that he would be bound to make the discovery and produce the books. Why should there be a less right to discovery because this took place in Oregon, and because the information is contained in a letter sent by an agent in Oregon to his principal in this country? It appears to me as a matter of principle, looking at what is right and just, and for the purpose of saving expense, and enabling the truth to be discovered, it is in the highest degree desirable that such a discovery should be afforded.

I am, therefore, clearly of opinion, in accordance with the practice that has prevailed in courts of equity before the Judicature Acts, and I should say in accordance with what I think is just, right, and expedient, if we are simply to take the rule as we find it laid down in the Order and interpret it, that this discovery ought to be made.

BAGGALLAY, J.A.: I am of the same opinion. The bill in this case asserts a claim based upon a transfer by the defendants, the banking company, at their branch in Oregon, of a balance from the London account of Laidlow & Gate representing a joint adventure to the private account of the same parties. Whether that claim is well or ill founded depends upon the particular circumstances of the case, all which circumstances are within the knowledge of the manager of the banking corporation in Oregon. Some ten months before the bill was filed, and at a time when it would appear from the affidavits that litigation in respect of this matter was very probable, a telegram had been sent from the London bank to the Oregon manager requesting him to send the fullest particulars of the transaction. Now if the defendant in this case, instead of being a banking company, had been an individual banker, and his business either in

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London or Oregon had been carried on under his own immediate direction, it could not have been for one moment contended that he would not be bound to give the fullest particulars as to the circumstances under which this transfer from one account to the other took place. It would be 662] no answer for him to say: **"I did not attend to this matter personally. I sat upstairs, and the business was managed by my clerks here or by my clerks in Oregon."* He would be bound, for the purpose of making the discovery, to ascertain from his clerks or manager all the particulars of the case. Is there any difference between such a case and this? You have the defendants, who are a corporation, instead of a defendant who is an individual. The banking corporation would be bound, in some form or other, either by answer from their manager or by answer put in under their common seal, to give the fullest and most complete information as to the whole matter. It appears to me that such would be the case even if there were no litigation or no threat of litigation, until the bill itself was filed. I can understand no possible ground, consistent with the recognized principles on which discovery is given in suits in equity, upon which the information afforded by this letter can be withheld. It might be very different indeed if the letter had contained certain matters not within the knowledge of the parties writing the letter, or not within their means of information in the ordinary discharge of their duties. It might possibly be that there might be some information contained in the letter which might be the subject of privilege. But that claim is not made here. There is no claim made of special privilege as regards the contents of the letter, but it is simply a claim of privilege on the ground that it was written in reply to a telegram asking for particulars.

Solicitors: *Parker & Clarke; Freshfields & Williams.*

[2 Chancery Division, 663.]

V.C.M., Jan. 26, 81; Feb. 1: C.A., March 31, 1876.

663] *SHARPLEY V. SOUTH AND EAST COAST RAILWAY COMPANY.

[1875 S. 187.]

Company—Insufficient Capital—Misrepresentations—Shareholder's Acquiescence.

A shareholder in a company filed a bill to have his contract to take shares declared void on the ground of deception and misrepresentation of the company by reason of

their having commenced their railway when only one-fifth of the share capital was subscribed, and having entered into a contract for the construction of a part only of the proposed line, with insufficient capital:

Held, by Malins, V.C., that the grounds alleged by the plaintiff would have been sufficient to sustain his bill, but that he had disentitled himself to relief by reason of various acts of acquiescence when he knew the financial position of the company, and by reason of delay in filing the bill:

Held, on appeal (without giving any opinion as to the plaintiff's original title to relief), that his bill must be dismissed on the ground of his having continued to act as a shareholder for some months after he became aware of the circumstances on which he founded his case.

THIS bill, which was filed by Thomas Sharpley, a medical practitioner of Louth, against the Louth and East Coast Railway Company, stated that the act of Parliament authorizing the construction of the railway received the royal assent on the 18th of July, 1872. That the railways thereby authorized were four. The first of which, Railway No. 1, was about twelve miles in length, from Louth to Maplethorpe. The three other lines, which were branches of No. 1, were to the extent collectively of five miles, making in all seventeen miles; the capital of the company was to be £96,000 in 9,600 shares of £10 each. It was provided by the act that the company should not issue any share created under the authority of the act, nor should any share vest in the person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share should have been paid in respect thereof; and the company was authorized from time to time to borrow on mortgage any sum not exceeding in the whole £32,000, but no part thereof should be borrowed until the whole capital of £96,000 was subscribed for, issued, and accepted, and one-half thereof was paid up. The powers of the company for the [664] compulsory purchase of lands were not to be exercised after the expiration of three years, and the railways were to be completed within five years from the passing of the act.

In the year 1873 the plaintiff received from the company a prospectus containing, among other things, the following statements: The directors are prepared to receive applications for 9,600 shares of £10 each, constituting the share capital of the company. If no allotment be made the deposit of £1 per share will be returned in full. A provisional contract has been entered into with a responsible contractor for the construction of the several railways by the 1st of July, 1875.

The plaintiff alleged that he was induced by a perusal of the prospectus to believe that it amounted to a representation that the company would not make any allotment of

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shares or commence business unless sufficient capital was subscribed, that is, unless at least two-thirds of the 9,600 shares were issued or allotted, such being the proportion of shares required by the Stock Exchange to be issued or allotted before a settling day would be granted. That the objects of the company could not be carried out without the subscription of at least two-thirds of the capital. The plaintiff applied for thirty shares in the company, and paid £1 per share deposit to the bankers. The shares were afterwards allotted to him, and he then paid a further sum of £60, according to the terms of the prospectus. The period of three years allowed by the act for the purchase of lands expired on the 18th of July, 1875, but the only land acquired by the company at that date consisted of a few small plots containing but a few acres, and nothing further had been done towards the construction of the railway. The total number of shares applied for in the company did not exceed 1,846, representing a subscribed capital of £18,460 only, and of this the total amount subscribed up to March, 1875, was £9,619, of which £4,664 had been expended in preliminary expenses and bills of costs. The calls in arrear amounted to £1,258, and the amount of subscribed capital uncalled was £7,394, while the amount of capital for which no subscription had been or could be obtained was £77,540.

In the month of September, 1874, the plaintiff received a 665] *circular from the company informing him that circumstances had rendered it necessary for them to terminate the negotiations they had entered into for the construction of the railway, and they had since entered into negotiations with a contractor competent to complete the works, and a contract had been prepared which would be submitted to the shareholders for their approval at the next half-yearly meeting of the company. A meeting was accordingly held on the 19th of September, 1874, when it was stated by the chairman that it was clearly understood that if the construction of the railway was not carried out the money intrusted to the directors would be returned to every shareholder. The proposed contract for the construction of the works was then submitted to the meeting, and after much discussion a committee of shareholders was appointed to confer with the directors on the subject and to report at an adjourned meeting which was to be held a fortnight afterwards. The committee so appointed at this meeting prepared a report and sent it to the directors, in which they recommended as follows: First, they believed that with the amount of capital

subscribed it was impracticable to proceed with all the lines of railway which they were empowered to make, and recommended that only No. 1 railway, from Louth to Mapletorpe, should be then constructed and the other three postponed. That a contract for No. 1 railway should be at once entered into based upon the following or somewhat similar terms: 1, that the line should be completed within twelve months from the signing of the contract; 2, that the first one-third part of the contract price and any extras, less 15 per cent. deduction, be taken in shares of the company on certificate of the engineer of the work done, and that no payment be made to the contractor until four miles of the line should be made from the Louth end and properly fenced; 3, that the payment of the second one-third part of the contract price and extras, less deduction as aforesaid, be in bonds of the company, exchangeable only for debentures payable at the expiration of three years on debenture stock of the company, and payable for work done on certificate of the engineer; and, 4, that the payment of the third part of the contract price and extras, less deduction as aforesaid, be paid in £5 per cent. bonds of the company, payable at the expiration of three years. *The [666 committee further stated that they had been informed that the contractor was unwilling to accept the following of their recommendations: First. The contractor would only undertake to complete the works within twelve months after being put into possession of the land required. Secondly. That he would only agree to a deduction of 10 per cent. from the payments for work done on the engineer's certificate. Thirdly. He would only agree to make and fence two and a half before payment in lieu of four miles. The committee were willing, under the circumstances of the company, to recommend a concession to the contractor's proposals as to the period for completion of the line and as to the length of the line to be constructed before any payment was made, but they considered it essential for the security of the shareholders that the deductions from the payment made to the contractor should be at the rate they had recommended. This they considered of great importance, and that it was absolutely necessary for the protection of the shareholders. They further recommended that the whole of the then subscribed capital of the company should be applied exclusively to the purchase of the land, and that no preferential charges in addition to those named in their recommendations should be created.

The plaintiff attended the adjourned meeting and pro-

tested against a proposed contract being entered into with Mr. H. Jackson, a contractor, to make the railways except in accordance with the report and recommendations of the committee. At such meeting the attention of the directors was drawn to the insufficiency of the subscribed capital for the purposes of the undertaking, and particularly with reference to the cost of the land, and nothing was stated by the directors at such meeting of their intention to enforce the calls due by the shareholders. Nothing further took place between the committee of shareholders and the directors until the half-yearly meeting on the 23d of March, 1875, when a report was submitted by the directors to the meeting, which was to this effect: On the 3d of October last a contract was entered into with Messrs. Henry Jackson & Co. for the construction of railways 1, 2, and 4 for a sum of £98,000. The contract also provided for the possession of the land for railway No. 1 being given to the contractor [667] within nine months from its date. At the *conclusion of the meeting a special meeting would be held for the purpose of authorizing the company to issue debenture stock instead of debentures, and of applying to the Board of Trade for an extension of time to purchase the land required for railways 2, 3, and 4, and for other purposes. At the last-mentioned meeting the plaintiff again protested against any further call or payment being made or attempted to be enforced in respect of the shares.

On the 28th of June, 1875, an action was commenced by the company against the plaintiff in the Queen's Bench to recover the sum of £61 10s. 10d., being the amount of the first call of £2 on each of the said thirty shares and interest.

The contractor, Mr. Henry Jackson, had not been put into possession of any part of the land required for the railway, and nothing further had been done towards the completion of the railway, and no further capital was likely to be raised by the company, and the railway could not in fact be completed.

The bill prayed that it might be declared that the plaintiff was induced to apply for thirty shares in the company under circumstances of deception and misrepresentation of the company, and that the contract between the plaintiff and defendant company for taking such shares was absolutely void; that the name of the plaintiff might be removed from the register of shareholders, and that the company might be decreed to repay to the plaintiff the sum of £90 so paid by the plaintiff in respect of the said shares; and that the company might be restrained by injunction from

further prosecuting the action against the plaintiff for recovering the said sum of £81 10s. 10d., or any sum of money in respect of the said shares.

The defendant company, by their answer, denied that the prospectus was intended to represent that no allotment of shares would be made unless two-thirds of the 9,600 shares were issued or allotted; that the company had nothing to do with the Stock Exchange, and were not bound by any rules regulating a settling day. The company was *bona fide* formed in the interest of the locality, and it was wholly immaterial to them what the rules of the Stock Exchange as to settling days might be. It was immaterial whether the railway could or could not be constructed without *the subscription of at least two-thirds of the capital, [668 seeing that the whole of the capital had been subscribed for before the filing of this bill.

The plaintiff at first applied for twenty shares only in the company on the 1st of December, 1873. A meeting of the shareholders was held on the 28th of March, 1874, to consider the position of the company. At that meeting the shareholders were informed that £14,220 had up to that time been subscribed for in shares; and at such meeting a resolution was passed "That this meeting expresses its entire confidence in the directors, and leaves all matters of detail in their hands." The plaintiff was not present at that meeting, but the account of it was published in the Louth newspaper, and a copy of the newspaper was delivered to the plaintiff, who must have known what took place at the meeting; and on the 4th of April, 1874, the plaintiff applied for ten more shares in the company.

Under these circumstances the plaintiff could not have applied for the thirty shares believing that the directors would not allot shares unless two-thirds of the 9,600 shares were applied for. The allotment of shares was made on the 2d of May, 1874, at which time the directors *bona fide* believed that they were in a position to secure the construction of the railway. It was true that the company had only acquired a few acres of land in small strips, but the whole number of acres required to construct the Railway No. 1, which was the longest and most important, was only fifty acres.

The meeting held, as stated in the bill, on the 19th of September, 1874, was attended by the plaintiff; and the plaintiff was one of the six persons forming the committee appointed to confer with the directors and report as to the propriety of entering into the contract with Mr. Jackson.

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At the adjourned meeting, held a fortnight afterwards, the plaintiff did not protest against the proposed contract being entered into except in accordance with the recommendations of the committee. At that meeting a resolution, "That the contract which had been prepared, subject to as many of the suggestions of the committee as can be complied with, be entered into," was, by way of amendment to a resolution to the effect that the resolutions of 669] *the committee should be carried out, proposed, and was voted for by forty-five of the shareholders then present, and the resolution was voted for by one shareholder only. Neither the plaintiff nor any member of the committee voted either for the amendment or the original motion. Nothing was stated by the directors at that meeting as to their intention to enforce any calls due by the shareholders, for the reason that at that time no call had been made.

It was in pursuance of the resolution passed at that adjourned meeting that the directors entered into two contracts with H. Jackson, one on the 3d of October, 1874, and another on the 21st of April, 1875, by which H. Jackson contracted to fit up and complete the whole of the railways upon the terms and conditions therein mentioned, and by the last contract Jackson subscribed for and agreed to take 7,754 shares in the company. After that contract was executed the whole of the 9,600 shares in the company were in this manner subscribed for and taken up.

The defendants denied that the contractor had not been put into possession of any part of the land required for the railway; on the contrary, he had been put into possession of land sufficient to make upwards of three miles of railway, and he had commenced the works. The first sod was turned on the 12th of August, 1875, and the directors were taking active steps to obtain possession of all the land which would be required for the whole of the railways and works. The directors believed that the railway could and would be completed, but if it could not, it would be in a great measure because of the action of the plaintiff in this suit, and of the opposition and prejudice which he had raised and excited against the undertaking.

They further stated that the plaintiff had never before the filing of the bill applied to the company or to the directors to remove his name from the register of shareholders, or to repay him the said sum of £90. It was not known to the company that they had any power to remove the plaintiff's name from the register and repay him the £90, even if they were desirous of doing so; but, under the circumstances, they

could not, as to their belief or otherwise, say whether the company did or did not refuse to remove the plaintiff's name from the register, or whether or not to repay him the said sum of £90.

*There was evidence on behalf of the plaintiff that [670 the contractor engaged by the directors to perform the works was not a man of sufficient capital to carry out the contract ; but, on the other hand, it was shown that there were men of capital who would support and assist him in the undertaking.

The case came on for hearing before Vice-Chancellor Malins on the 26th of January, 1876.

Glasse, Q.C., and *Nalder*, for the plaintiff: This case is entirely covered by that of *Cohen v. Wilkinson* ⁽¹⁾, affirmed on appeal ⁽²⁾. There the company was formed for the purpose of making a railway from London to Portsmouth, and not having sufficient capital for the purpose they determined upon constructing a portion of the line from Epsom to Leatherhead, and an injunction was granted to restrain the company from applying the funds in the construction of only part of the line. In that case the Master of the Rolls, Lord Langdale, made this observation ⁽³⁾: "I recollect hearing Lord Eldon, in the case of *Agar v. Regent Canal Company* ⁽⁴⁾, most distinctly state his opinion, that if it were clear that the company were unable to complete the whole canal contemplated by the act they could not lawfully begin any part of it."

Here the case is precisely the same ; the company have not been able to raise more than a seventh part of the sum prescribed by the act as the requisite capital for making the line, and without raising that amount they cannot exercise their borrowing powers, consequently they will be totally unable to construct the whole line, but notwithstanding this fact they have entered into a contract for the construction of about four miles of railway. They have not even funds sufficient to purchase the land, and a great portion of the sum already raised has been expended in preliminary expenses. The completion of the scheme is, therefore, utterly hopeless, and the plaintiff, who applied for shares upon the faith of the whole line being carried out according to the terms of the prospectus, finds his money applied for the payment of expenses. This was the same as the course pursued in the case *of *Rooper v. East Norfolk Tram-* [671

⁽¹⁾ 12 Beav., 138.

⁽²⁾ 1 Mac. & G., 481.

⁽³⁾ 12 Beav., 128.

⁽⁴⁾ 1 Sw., 250.

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way Company (before Vice-Chancellor Malins, July 19, 1875; L.J.J., July 31, 1875).

The prospectus distinctly stated that if no allotment was made the deposit would be returned in full, and the act provided that the company should not issue any share, nor should any share vest in the person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share should have been paid in respect thereof. The amount so specified has not been paid by any shareholder, therefore the shares cannot be allowed to vest in the applicants for shares, and the plaintiff is entitled to a return of the money he has paid for a purpose which the company will never be able to effect. The plaintiff was induced to apply for shares on the misrepresentations contained in the prospectus, and on that ground he is entitled to have his name removed from the list of shareholders. This principle is laid down in the cases of *Henderson v. Lacon* ⁽¹⁾ and *Western Bank of Scotland v. Addie* ⁽²⁾.

It appears from the evidence that Mr. Jackson, the contractor, is not a person capable of carrying out the works himself and this was not known to the plaintiff at the time he joined with the committee in reporting upon the subject of the contract.

Higgins, Q.C., and *Onslow*, for the defendant company: The case of *Cohen v. Wilkinson* ⁽³⁾ has no application to this case, since it was acknowledged there that the company had no intention of constructing any more than one-fourth of the line, which was a very small part of the original length for which the act was obtained, and it was acknowledged that the funds could never be obtained for the whole line, whereas in this case it never was the intention of the directors to give up the whole line, but only to construct the main line, No. 1, before the three branches. Contracts for the whole of the lines have been entered into, and the directors entertain the full belief that they will be able to make all the railway. The plaintiff is a medical practitioner in the town, and from the first commencement of the undertaking he took a leading and active part in canvassing for 672] shares, in attending meetings, and in doing his utmost to forward the scheme. The plaintiff was aware that the whole of the capital had not been subscribed, and yet after this had been fully stated at the meeting of March, 1874, he applied for ten shares beyond the original twenty shares which he had at first applied for. Again, the plaintiff

⁽¹⁾ Law Rep., 5 Eq., 249.

⁽²⁾ Law Rep., 1 H. L., Sc., 145.

⁽³⁾ 12 Beav., 138; 1 Mac. & G., 481.

himself was a member of the committee appointed to advise with the directors as to the contract, and the committee then advised that No. 1 Railway only should be constructed.

As to misrepresentation, there has been no case amounting to fraudulent misrepresentation, such as appears in *Henderson v. Lacon* ('). The true principle is laid down in *Western Bank of Scotland v. Addie* ('). A contract to take shares cannot be set aside on the ground of its being founded on a prospectus containing exaggerated views of the advantages of a company, if it does not contain any material misstatement of fact: *Denton v. Macniel* ('); nor upon an ambiguous statement, the truth of which might have been ascertained: *Hallows v. Fernie* ('); nor by reason of an innocent misrepresentation not affecting the substance of the matter: *Kennedy v. Panama, New Zealand and Australian Royal Mail Company* ('). A misrepresentation which will set aside a contract must be material, and must be made without a belief in the truth of the statement: *Jennings v. Broughton* (').

But whatever difficulties the company may have had, the plaintiff was well acquainted with all the proceedings. He knew from time to time the amount of capital raised; he, as one of the committee, recommended that the works should be commenced, with the full knowledge of the small amount of capital; and he knew that the contract was to be entered into with Mr. Jackson, and advised as to the form of contract. No objection was raised by him to the contractor, and no protest was made against the conduct of the directors. All these are acts of acquiescence which disentitle the plaintiff to any relief. He is also disentitled on the ground of delay in coming to the court, since nothing was done by him after the meeting of March, 1875, until the filing of this bill, four months afterwards, on the 24th of July, 1875.

*If there was any right originally on the part of [673 the plaintiff to set aside this contract, he has lost it by his subsequent conduct, and has prevented himself from obtaining relief by his delay in coming to the court. It is the duty of a person who alleges fraud to put forward his complaint at the earliest possible period: *Jennings v. Broughton* ('); *Ashley's Case* ('); *Scholey v. Central Railway Company of Venezuela* ('). Three months' delay was

(1) Law Rep., 5 Eq., 249.

(2) Law Rep., 1 H. L., Sc., 145.

(3) Law Rep., 2 Eq., 352.

(4) Law Rep., 3 Ch., 487.

(5) Law Rep., 2 Q. B., 580.

(6) 5 D. M. & G., 126.

(7) Law Rep., 9 Eq., 263.

(8) Law Rep., 9 Eq., 266, n

held sufficient to disentitle the plaintiff to relief in *Heymann v. European Central Railway Company* ⁽¹⁾; and the time begins to run from the period when the misrepresentation might have been discovered. Any acting under a contract after a man has had notice of the alleged fraudulent circumstances from which he was induced to enter into the contract, amounts to a ratification of it: *Rooper v. East Norfolk Tramway Company*.

There has been some misunderstanding as to the clause in the prospectus, "that the company should not issue any share, nor should any share vest in the person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share should have been paid in respect thereof." The same clause was discussed in the case of *East Gloucestershire Railway Company v. Bartholomew* ⁽²⁾, and it was held that the word "issue" referred to the issuing of certificates of shares, and the word "vest" to the vesting of shares, so as to be property and capable of transfer; but that the section did not make the payment of one-fifth a condition precedent to the liability as a shareholder of the person accepting the share. And under the same clause, in *McEuen v. West London Wharves and Warehouses Company* ⁽³⁾, it was decided that, notwithstanding this proviso, a shareholder who had not paid one-fifth of the amount of the shares which had been allotted to him was liable for payment of calls. This was also the decision in *Purdey's Case* ⁽⁴⁾.

Glasse, in reply: The plaintiff's case is this: that there is a positive undertaking by the company, given in the most [674] formal and complete way, that *unless there should be a sufficient allotment of shares, the money paid upon them should not be applied for the purpose of making the railway, but should be returned to the shareholders. It turns out that a requisite amount of capital has not been subscribed, and cannot be obtained, and consequently it follows that the project must be abandoned, and the money returned. There was no acquiescence on the part of the plaintiff to the making of the whole railway, though there might have been acquiescence in the first stages of the proceedings, when all the parties were trying to obtain money to make the line. After all the exertions used it is found to be impossible to raise the capital, and therefore impracticable to make the line; and the plaintiff, finding this, is only desirous that his money should not be wasted in a

⁽¹⁾ Law Rep., 7 Eq., 154.

⁽²⁾ Law Rep., 3 Ex., 15.

⁽³⁾ Law Rep., 6 Ch., 655.

⁽⁴⁾ 16 W. R., 660.

useless undertaking. If the contract proposed by the committee had been carried out literally there might have been some ground for contending that the plaintiff had given a certain amount of acquiescence; but the recommendations of the committee have been departed from in several important particulars, and more particularly in contracting for the formation of the whole line when the company could not even purchase the land necessary for the works, and could not therefore carry out the contract entered into. Moreover, it was not known to the plaintiff at that time what were the means of the proposed contractor, but subsequent information has shown that Mr. Jackson is not capable of carrying out a contract of this nature, and the whole project must necessarily come to a stand-still, and all the money of the shareholders will be wasted.

MALINS, V.C.: This is a very unfortunate suit, which I think has originated in an over-earnest feeling rather than from any real regard to the interests concerned. The inhabitants of Louth, as I gather, very generally concurred in applying to Parliament to make a railway about seventeen miles long, with three branches, the main object being to communicate with different places on the east coast. I have no doubt it was a most desirable thing for the town of Louth, and I am satisfied it was an object in which Dr. Sharpley, the plaintiff, who was a medical practitioner in the town, entirely concurred. I must consider him [675 as approving of the contents of the prospectus, and as concurring in this representation recited in the act of Parliament: "Whereas the construction of the railways hereinafter mentioned to connect the east coast of Lincolnshire with the Great Northern Railway near Louth would be attended with local and public advantage, and the persons hereinafter named, with others, are willing at their own expense to construct the said railways." The act then provides "that the amount of capital shall be £96,000, in 9,600 shares of £10 each; that the company shall not issue any share created under the authority of the act, nor shall any share vest in the person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share shall have been paid in respect thereof."

Then there is a borrowing power authorizing the company from time to time to borrow on mortgage any sum not exceeding in the whole £32,000, but no part thereof to be borrowed until the whole capital of £96,000 should be subscribed for, issued, and accepted, and one-half thereof should have been paid up. It is plain, therefore, that Par-

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liament was satisfied that £96,000, plus £32,000, or £128,000, was the proper capital for the construction of this line.

The act received the royal assent on the 18th of July, 1872, but there were considerable delays; the capital was not forthcoming, although the inhabitants of the district were desirous of having the railway made. Very few in point of capital came forward to supply the £128,000 or the £96,000 which was wanted. No allotment was made till the 2d of May, 1874, and then, instead of subscribing for the whole 9,600 shares, it appears that the application which is stated in the bill was for £9,619, or about one-tenth of the capital. The prospectus stated that "If no allotment be made the deposit will be returned in full." It also stated that a provisional contract had been entered into with a responsible contractor.

The amount actually subscribed was totally and admittedly inadequate for the construction of the railway.

Now we go on to the 2d of May, 1874, when the application for shares was so small that it did not provide more than one-fifth of the capital required. And it is plain to my [676] mind that at *that time the proper course would have been to have announced to the shareholders that the capital was wholly inadequate, that no allotment would be made, and that therefore, in pursuance of the statement in the prospectus, the deposit would be returned, and that there was an end of the matter as the scheme had entirely failed.

Amongst the persons who applied for shares was the plaintiff, who originally applied for twenty shares on the 1st of September, 1873.

The plaintiff's course was a very plain one. If he did not concur in going on with this project, he should have at once remonstrated and have required the prospectus to be acted upon. He was fully entitled to say, "You have not got a sufficient amount of capital, your borrowing powers will not arise, you can only get £15,000 or £16,000 out of the amount required. It is utterly absurd to go on with this project, and I require you, in pursuance of the stipulation entered into with me, to return my deposit." That is the course which, in my opinion, common sense, common honesty, and common justice would have entitled him to take; because nothing is more common, not only in the case of this company but in that of other companies which come before me, than for directors to get into trouble when, requiring a large amount of capital, they persist in going on with only a small proportion of the capital which they require. If Dr. Sharpley had taken the course which I have suggested,

I should have granted him relief, and my own opinion is that the Court of Appeal would have supported me in that decision, and would have restrained the company from going on with their action for calls, and would have required them to give him back his deposit and take his name off the register of the company if he had applied in due time; but as I collect, Dr. Sharpley was as much in earnest at this period as any other inhabitant of the town; and he was of opinion that although this project had failed up to that time, nevertheless the thing should not be abandoned, because I find he was then attending meetings. He proposed resolutions and was on the committee. And what does he say? Not that the whole amount of capital should be subscribed before the thing is proceeded with, but that the railway should be gone on with before the *whole [677 of the money was subscribed. The allotment day was the 2d of May, 1874, but there was a meeting on the 12th of January, 1874, at which Dr. Sharpley was in the chair, and at which meeting they knew very well the capital had not been raised and would not be raised. Then he proposes resolutions which are in effect that they should go on with the line. A further meeting took place on the 28th of March, 1874, and again with the full knowledge that the capital had not been subscribed and was not likely to be subscribed. On the 4th of April, 1874, Dr. Sharpley applies for ten additional shares; so that before the day of allotment arrived he had not only applied for twenty shares originally, but for ten additional shares. Then on the 2d of May the whole thirty were allotted to him.

Now the proper course for Dr. Sharpley, under these circumstances, to have taken was either to concur with his neighbors who had projected the railway, or if he did not wish to go on with it he should have said, "I do not want to go on with it, give me back my money, I will withdraw." If he had done that, and persisted in it, I have no doubt he would have done great benefit not only to himself but to all his neighbors who are interested in this matter; because, after all, I cannot help thinking that the course adopted by these directors was a very unwise one. They can only make this railway with the assistance of a contractor; they have not the capital, they have not the money to purchase the land. They have not the security of a substantial contractor to make the line, and I believe if they go on they will only get into further trouble. They would have taken a very wise course if they had adopted Dr. Sharpley's view, and abandoned the thing altogether; but that does not

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settle the matter between them and Dr. Sharpley. He has encouraged them in their course, which I say is a want of wisdom on his part; and if he has encouraged them, the rules of this court make it impossible for him to oppose them or to sanction a bill against them, and precludes him from asking for the relief which he seeks by his bill, because he himself has been a participator in the acts of the company.

The question is, whether he has or has not acquiesced in these proceedings? Mr. Higgins has cited several cases, and they all proceed on the same principle in effect—that [678] although a man has *a strict right to restrain the informal proceedings of a company if he does not acquiesce in them, yet if he acquiesces he cannot restrain them. All those cases proceed on the doctrine laid down in *Cohen v.*

Wilkinson ⁽¹⁾, which are, in my opinion, entirely applicable to this case. Mr. Cohen was a shareholder in the Portsmouth Direct Railway Company. He filed a bill against the company, which was to make a railway from Portsmouth to London, and made the line from Epsom to Leatherhead instead of from Epsom to Portsmouth. There it was decided by Lord Langdale in the first instance, and on appeal affirmed by Lord Cottenham, that each individual shareholder, inasmuch as he had subscribed his money to make the whole line, was not bound to allow his money to go to make part of the line only, because it did not follow that if the whole line could not be made, a part could be; and I apprehend it is equally clear that any landowners in this case might file a bill to prevent the company from taking his land for the purpose of making a part of the line, because he might say, "I thought this project was a good one. I understood it was intended that the whole of the line was to be made, and that is what I assented to, but I do not assent to part with my land on the railway company making a part of the line only." That being the decision of Lord Langdale, affirmed by Lord Cottenham, it appears ⁽²⁾ that this doctrine of acquiescence was suggested by Lord Cottenham then for the first time, because I find he concluded his judgment in these words: "His Lordship concluded by observing that the only part of the case about which he entertained any doubt was the allegation at the bar, though nowhere apparent in the bill, that the plaintiff had been aware of and had acquiesced in the substituted undertaking. The plaintiff's counsel then stated that this was the first time that such an allegation had been made,

⁽¹⁾ 12 Beav., 138; 1 Mac. & G., 481.

⁽²⁾ 1 Mac. & G., 487.

and that it was entirely unfounded. The Lord Chancellor, therefore, ordered the appeal motion to be dismissed with costs." I have a distinct recollection of those observations, because I was counsel in that case for the railway company, and I had no doubt that the plaintiff had acquiesced. But it is clear to my mind, if Lord Cottenham had been satisfied that Mr. Cohen had agreed to make *part of the line [679 instead of the whole, he would have dismissed the bill, instead of giving the relief he did. Now what has been the conduct of Dr. Sharpley? From the first time of the allotment being made, in May, 1874, he knew of the deficiency of the capital. Has he since that time been a concurring party to making part of the line instead of the whole? Has he been a concurring party in employing the contractor, with a knowledge that the contractor was to supply the means, without being a registered shareholder? Because if he has been a concurring party in that, it is impossible for him to sustain a bill in this court to restrain these proceedings in which he has participated, and which he has encouraged.

There never has been a more remarkable instance of this than in a case which was before me last year, *Rooper v. East Norfolk Tramway Company*, in which the capital was to consist of 10,000 shares of £10 each. It appeared that 204 shares only had been subscribed for, that is, fifty shares by the plaintiff and 154 shares by other persons, the whole of those shares, including Mr. Rooper's, producing £2,000 only; the tramroad had not been commenced; it was perfectly clear there was no possibility of making the tramroad, no intention of making it, and it was perfectly plain to me (and, I believe, equally so to the Court of Appeal) that the only purpose to which they were going to apply Mr. Rooper's £500, which he was to pay up on the calls for his shares, was to pay their solicitor's bill and their secretary's salary. I thought then, and I think still, that it is a monstrous thing that a man who has subscribed £500 towards a capital of £100,000 to make a great public work, and after £2,000 in the whole only has been subscribed, and it is obvious that the plan cannot be carried into execution, should be obliged to pay £500 for the solicitor's bill and the secretary's salary, which £500 he subscribed to make a tramway. I therefore relieved Mr. Rooper. It was urged upon me that he had acquiesced, and that he had received a dividend after he knew something of the wretched state of the company, because, in fact, they had paid dividends out of capital. I thought his

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knowledge was so imperfect at the time he acquiesced, that he was not bound by that acquiescence, and so I gave him relief; and on going to the Court of Appeal Lord Justice [680] James and Lord *Justice Mellish, adopting the view that he had accepted a dividend, which they thought was a very strong thing, considered he was bound by his acquiescence, and dismissed the bill with costs, and Mr. Rooper was bound to pay the £500, with no possibility of the tramway being made, simply for the purpose of paying the solicitor's costs and secretary's salary. I think the doctrine of acquiescence cannot be carried further than that authority, which is the latest on the subject that has been cited. It is an authority by which I am bound, and which governs this case, if I come to the conclusion that Dr. Sharpley has acquiesced in part of the railway being made, and made by the aid of a contractor who has not sufficient capital, and if I am satisfied that he has concurred in the contract entered into with Mr. Jackson on the 3d of October, 1874, to make a part of the line, and has acquiesced in and approved of that contract. The additional contract of the 23d of April, 1875, is, I think, only a variation of the original contract, and falls within that which is sanctioned by the meeting of the 28th of March, 1874; and although Dr. Sharpley did not attend that meeting, I must attribute to him a knowledge of what took place, particularly as he applied for shares after the meeting had taken place. The object of the meeting of the 28th of March, 1874, was obvious to all parties, and the statement in the answer is that it was to consider the then position of the company, and especially with reference to the contractor for constructing the railway and works which was then engaging the attention of the directors, and the amount of the capital of the company which had been subscribed for, and to discuss the prospects of the company. At that meeting the defendant James Wilson informed the shareholders that £14,220 had up to that time been subscribed for in shares, and at such meeting a resolution was duly proposed, seconded, and carried.

Now, here is the intimation that only £14,220 out of £96,000 had up to that time been subscribed for. There is evidence that Dr. Sharpley had a report of that meeting, and he must have known of it. Indeed, he does not pretend to say that he did not know it, and he is as much bound by the proceedings of that meeting, in my opinion, as if he had been personally present. Then this resolution

was passed, "That this meeting expresses its *entire [681 confidence in the directors, and leaves all matters of detail in their hands." Therefore, here is Dr. Sharpley, with a knowledge that only one-seventh of the capital had been subscribed, acquiescing in, concurring in, and recommending the proceeding with the construction of the railway with one-seventh of the capital, and he now comes forward, and says that because the prospectus states, "If no allotment be made, the deposit will be returned in full," therefore he has now a right to have his money returned to him, and his name taken off the register of shareholders. That was a right which was vested in him on the 28th of March, 1874. On that day he might have said, "I am now informed that only one-seventh of the capital is subscribed for. You cannot, therefore, exercise your borrowing powers, and it is nothing less than madness to attempt to construct this railway. It is ridiculous to do so." That would have been a rational course for a man in his position to have taken at that time, and the whole thing would have been put an end to.

However, the question I have to decide is, whether, in this suit of Dr. Sharpley, I can grant an injunction against the company to prevent them from doing these very things which he has sanctioned their doing.

Now, with regard to the contract of the 3d of October, 1874, with Mr. Jackson, Dr. Sharpley seems to have made no inquiry at that time, and by the evidence, I must consider that he is bound by this contract; and although there is not the same evidence of his personally being bound by the second contract, yet there is a resolution passed by which he is duly informed that the details are left to the directors, in whom he and all other shareholders had entire confidence. Therefore, he has acquiesced in the making of the contract by the agreement of 1875, which is a sanction of what the directors have done on the authority of *Rooper v. East Norfolk Tramway Company*, and the other authorities cited by Mr. Higgins, namely, the cases of *Denton v. Macniel* (*), *Hallows v. Fernie* (*), *Kennedy v. Panama, New Zealand and Australian Mail Company* (*), *Ashley's Case* (*), and the case of *Scholey v. Central *Rail- [682 way Company of Venezuela* (*). In the last case, Lord Cairns lays down the rule that the plaintiff there had a perfectly clear and a good case if he had come in time, that is, if he had filed his bill as soon as he read the report, but as he

(1) Law Rep., 2 Eq., 352.

(2) Law Rep., 3 Ch., 467.

(3) Law Rep., 2 Q. B., 580.

(4) Law Rep., 9 Eq., 263.

(5) Law Rep., 9 Eq., 266 n.

delayed doing so for three months, it was too late, and the bill was dismissed.

Then, on the 23d of March, 1875, I have Dr. Sharpley attending a meeting, in which it is plain that the whole circumstances of the company were brought forward. There had been a report of the directors recommending the proceeding with this railway. "It having been moved, That the report of the directors be adopted, and a full discussion having taken place, an amendment was moved by Mr. J. G. Smith, and seconded by Mr. Sharpley, that the adoption of the report of the directors be adjourned in order that the shareholders might have further details of expenditure." That is the view of Dr. Sharpley, that they must have further details of expenditure. What expenditure? An expenditure at a time when only one-fifth or one-sixth of the capital was subscribed, and he was, therefore, sanctioning that expenditure going on. "The amendment having been put to the meeting, it was declared not to have been carried, and the original proposition having been then put, was declared to have been carried by a large majority. The meeting having proceeded to the election of the directors, it was moved that Mr. Frederick Heritage be a director of the company, and Mr. Heritage was declared to have been duly elected." Now it is perfectly clear that Mr. Heritage was the solicitor of Mr. Jackson, the contractor; and it is also clear that Mr. Heritage had no other claim to be a director of this company than that of being Mr. Jackson's solicitor. To my mind it is plain that Mr. Jackson had made this stipulation: "I am to find the capital. I am to find the material with which to do the work for £98,000, and in order that my interests may be duly protected, I must have a director on the board." Whom does he select? His solicitor, Mr. Heritage. What could Dr. Sharpley suppose about this? Why does Dr. Sharpley concur in appointing Mr. Heritage a director? Only because he knew that Mr. Jackson had entered into this contract, and had stipulated [683] that Mr. Heritage *should be a director. Therefore, so late as March, 1875, we have him concurring in the proceedings which he now seeks to stop. I agree very much with what Mr. Higgins has said, that such an amount of acquiescence has seldom been brought forward in any case as there is here against Dr. Sharpley. That brings us down to the 23d of March, 1875, and from that time Dr. Sharpley appears to have been acquiescent. He does not appear to have taken any further part, but to have remained silent. Did he give any notice to his co-adventurers what

his views were? Did he warn them not to go on? The bill has never been amended, and there is no contradiction to this statement in the answer. "The plaintiff never before the filing of the bill in this suit applied to the defendant company, or to the directors thereof, to remove, and the defendant company was not asked to remove, his name from the register of shareholders in the said company, or to repay the plaintiff the said sum of £90. It is not known to the defendant company that they have any power to remove the plaintiff's name from the said register, or to repay him the said sum of £90, even if they were desirous to do so. Under the circumstances aforesaid, we respectively cannot, as to our belief or otherwise, say whether the defendant company do or do not refuse to remove the plaintiff's name from the said register, or whether or not to repay him the said sum of £90." But the material statement is, that having acquiesced in the proceedings on the 23d of March, 1875, with a view of carrying Mr. Jackson's contract into execution, he makes no further objection, but remains quiet and allows them to go on; and thereby again acquiesces in their proceedings. But when an action is brought against him for calls, then, in order to restrain that action, he files his bill.

I have not had anything read to show that he ever protested against the calls. The persons connected with this company are, I believe, a most respectable body of gentlemen; and Mr. Wilson, who has been cross-examined, gave his evidence in a manner entirely satisfactory to my mind. A very intelligible statement has been made by him and by others. And although I quite agree with what has been said about this company going on without a sufficient capital, yet I am quite satisfied that everything they have done has been honestly intended to be done by them; *and that they honestly believe that the railway [684 will be beneficial, and that they hope to carry it out and construct it. But here you have Dr. Sharpley, after the meeting of the 23d of March, identifying himself with these proceedings, and lying by without saying a word and without taking any steps either by himself or by his solicitor, Mr. Mason, although Mr. Mason is a very zealous solicitor. Why did not Mr. Mason write a letter to the company saying, "If any further attempt be made to press my client for calls, he will resist it." Why did he lie by all this time until an action is brought for calls? It is then for the first time you have a bill filed with this statement in it—that he was induced to take the shares by fraud. All that must be

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taken into account in considering his conduct. In my opinion he would have been entitled to succeed if it had not been for the acts of acquiescence; but in consequence of the acts of acquiescence I am of opinion he has entirely lost his right to succeed. I therefore think the bill has failed, and has been a very great mistake. I think the acts of Dr. Sharpley, and the manner in which he has concurred in these proceedings for so long a time, beginning with the application for shares in December, 1873, and carried down to March, 1875, after he had concurred with his neighbors, who I will assume to be friends of his in the town of Louth, have disintitiled him to any relief in this suit. Although I was at first impressed with the idea that there were a great many shareholders who concurred with him in the course he has taken, it now turns out, and it has not been contradicted, that there are only shareholders interested in twenty-seven shares, in other words, representing £270, who are now resisting the payment of calls.

I am of opinion, on the whole, that the relief must be refused; that judgment must be entered for the defendants; that the bill ought not to have been filed, and that it must now be dismissed with costs.

The plaintiff appealed from this decision, and the appeal came on to be heard on the 31st of March, 1876.

Glasse, Q.C., and *Nalder*, for the appellants, urged the same arguments as below.

685] **Higgins, Q.C.*, and *Onslow*, for the company, were not called upon.

JAMES, L.J.: Looking at the nature of the bill and the facts admitted on both sides, there is no ground for interfering with the decision of the Vice-Chancellor. The case made by the bill is that the plaintiff was induced to take shares by misrepresentations contained in the prospectus and in a letter of the secretary. That is the plaintiff's case. The Vice-Chancellor held that, assuming this to be so—assuming, in the plaintiff's favor, that the misrepresentations were of such a character as the plaintiff alleged—no relief could be granted, because the plaintiff, after he knew what the company had done, what it was doing, and what it was able to do, acted as a shareholder, attended meetings of the committee, and for months continued to act as a shareholder with full knowledge of every circumstance entitling him, if he ever was so entitled, to be relieved from his shares. If a man claims to rescind his contract to take shares in a company on the ground that he has been in-

duced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts, or else he forfeits all claim to relief. It is argued that the plaintiff ought not to remain liable to pay calls because the company are illegally applying them in making part of the line without any intention to make the rest. That is not the case made by the bill, which, to obtain relief on this ground, ought to have been framed in the same kind of way as that in *Cohen v. Wilkinson* (¹); and it would have been difficult for the plaintiff, after his being present at and concurring in the proceedings of meetings at which resolutions were passed for making part only of the line, to obtain relief even on a bill so framed.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for plaintiff: *Collyer-Bristow, Withers, & Russell*.

Solicitor for defendants: *R. Dickson*.

(¹) 1 Mac. & G., 481.

[2 Chancery Division, 692.]

M.R., March 1, 14, 15, 22, 1876.

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[1874 B. 355.]

Nuisance—Artificial Work—Injunction—Noise—Damp.

The occupier of a house is liable for allowing the continuance on his premises of any artificial work which causes a nuisance to a neighbor, even though it has been put there before he took possession.

In a suit by the owner and occupier of a house against the occupier of an adjoining house, complaining of noise from the defendant's stable and of damp from an artificial mound on which it stood:

Held, that the plaintiffs were entitled to an injunction to prevent the defendant from keeping horses in his stable so as to be a nuisance; and that the defendant was also liable for not preventing the damp from going through the plaintiffs' wall.

THE object of this suit was to restrain an alleged nuisance to the plaintiffs' house occasioned by damp from the adjoining stables of the defendant, and from the noise occasioned by the defendant's horses.

The bill was originally filed in 1874, by J. L. Broder and W. K. Broder, who were the legal owners, as trustees under a will, and also beneficial owners of the house No. 11 St. George's Terrace, Regent's Park Road. The defendant was the occupier of the adjoining house, called Hill View, on the western side thereof. It was erected some years before the suit was instituted, while the plaintiffs' house was let to one G. Mills. The stables belonging to it were built almost

against the flank wall of the plaintiffs' house, upon a mound of earth which was raised to a considerable height against the said wall, which wall was not a party-wall.

In 1874, the former tenancy of No. 11 St. George's Terrace, having come to an end, an agreement was entered into between Messrs. Broder and J. M. Milner for a lease of the house, and while the lease was being prepared Milner entered into possession of the house, when, according to the allegation in the bill, he discovered that the defendant's stables created a nuisance which rendered the house uninhabitable. The plaintiffs alleged that they were not previously aware of such nuisance.

The 9th paragraph of the bill, as originally framed, was 693] as *follows: "The wall of the said stables is built very near, but not actually touching, the outer wall of the said messuage No. 11 St. George's Terrace, and, in consequence, the rain being driven in and lodging between the two walls, and the moisture from the ground not being able to evaporate, the damp soaks into the wall of the said messuage, and the dampness so caused has destroyed the papering in the hall of the said messuage, and is gradually rotting away the wall adjoining the said stables."

The bill was twice amended, and the second time by special leave of the court, when the following paragraph was substituted: "The said stables are built as aforesaid on a mound of earth heaped to a great height against the outer wall of the said messuage, 11 St. George's Terrace, and the wall of the stables touches, or almost touches, the wall of the house. The drainage and moisture from the stables and rain soaks into the earth on which they are built, and from these causes the damp soaks into the wall of the said messuage," &c. Before the earth was heaped up and the stables built against the said wall, it was perfectly dry and sound.

The bill then alleged as follows: "A far worse nuisance, however, is caused by the constant noise arising from the stamping and kicking of the horses, the rattling of the ropes and chains and blocks against the ring-bolts and mangers, the rolling and cleaning of carriages, and the other noises inevitable in a stable of considerable size as this is, which cause the greatest discomfort and annoyance to the inmates of the said messuage. The noise and other annoyances are worst at night and in the early morning, and are, in fact, so intolerable that the said J. M. Milner, though very desirous of completing his bargain, finds that it is impossible for him to continue to occupy the house. His wife, who is in deli-

cate health, has been compelled to leave, and he has given the plaintiffs notice that unless the nuisance is abated he will be compelled, at any cost, to refuse to take a lease of the said messuage and premises."

It appeared from the correspondence set out in the bill that the house and stables occupied by the defendant were built some time before he entered into possession.

*The bill prayed that the defendant, his servants [694 and agents, might be restrained from so using the stables adjoining No. 11 St. George's Terrace, and from permitting the same to continue in such a state as to occasion any nuisance or annoyance to the occupiers for the time being of the said messuage and premises, or to occasion any damage to the fabric of the said messuage, and for consequential relief.

The defence raised was that the alleged nuisance from the noise of the horses was greatly exaggerated, and that the defendant could not be answerable for any injury arising from the damp from his stables which were erected before he came into possession.

Affidavits having been filed on behalf of the plaintiffs and defendant, the case came on for hearing on the 1st of March, 1876.

Roxburgh, Q.C., and *Whitehorne*, for the plaintiffs.

Southgate, Q.C., *Philbrick*, Q.C., and *Romer*, for the defendant, took an objection to the frame of the suit that the Messrs. Broder were not the proper parties to sue, inasmuch as the alleged injury was of a temporary nature, and did not affect the inheritance, and that the occupier, J. M. Milner, was really the person, if any, who was aggrieved.

JESSEL, M.R., gave leave to amend the bill by adding Milner as co-plaintiff. His Lordship also, with the consent of both parties, appointed Mr. Edward P'Anson, architect, as special referee, in the following form:—

That it be referred to Mr. Edward P'Anson, of Lawrence Pountney Lane, in the city of London, special referee, to survey and to inspect plaintiffs' and defendant's premises respectively, and the premises adjoining thereto respectively, and to report whether or not the plaintiffs' premises are affected by noise arising or coming from the defendant's stables as ordinarily used by the defendant, and if so, then in what manner and to what extent and how the same is caused or arises; and to report whether or not the plaintiffs' premises are or are likely to be affected by the drainage coming from the defendant's stables as at present used,

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695] *and if so, to what extent, in what manner, and how the same is caused or arises. In making the above report the quality and nature of the construction, the present state, the position of the plaintiffs' and defendant's premises, and the nature and composition of their foundation, and the ground on which they stand respectively, are to be considered and reported on. Regard is also to be had to the surrounding levels and adjoining premises, and for the purpose of making his report thereon the said Edward I'Anson is to be at liberty to direct all such reasonable works and things on the plaintiffs' and defendant's premises to be done as he shall consider necessary; and the said Edward I'Anson is to be at liberty to refer to model, plans, and sections, and to bill and answer, of which copies are to be supplied, it being understood that such reference is to bind neither party by way of admission; and for the purpose of the said inquiry the said Edward I'Anson is to be attended by one solicitor and by one surveyor, to be appointed by the plaintiffs and defendant respectively; and the said Edward I'Anson is to attend his Lordship on the sitting of this court on the 14th of March; and that the cause do stand over until the said 14th of March.

March 14. Mr. I'Anson having made his report, which, so far as material, is referred to in the judgment, the case proceeded, and witnesses were examined on both sides. Milner deposed that the rest of himself and his family at night was materially disturbed by the noise of the horses in the adjacent stables.

As to the damp, the plaintiffs adduced evidence to show that it was occasioned in some degree by leakage from the soil pipe of the privy in the defendant's stables, and partly from the fact of the stables being erected on a mound of made earth, more porous than the surrounding soil, through which the wet percolated to the plaintiffs' wall.

The defendant endeavored to show that the percolation arose from the porous nature of the bricks of which the plaintiffs' wall was built. This, however, Mr. I'Anson considered not to be the case.

696] *The general effect of the evidence appears from the judgment.

Roxburgh, Q.C., and *Whitehorne*, for the plaintiffs: The defendant is liable for any nuisance whatever on his premises which seriously inconveniences the occupiers of No. 11 St. George's Terrace.

In *Ball v. Ray* ⁽¹⁾ the Court of Appeal held that the occupier of a house could be restrained from permitting the continuance of a nuisance to the occupier of the neighboring house occasioned by the noise of horses on the ground floor which he used as a stable, although horses had been kept there previously to his occupation.

In *Brent v. Haddon* ⁽²⁾ it was held that the lessee of a mill which was a nuisance to a neighboring owner was liable in an action.

As to the damp, the evidence shows that it is occasioned partly by the soil pipe of the privy of the defendant's stables being broken, and partly by the stables being erected on a mound of made earth at a higher level than the defendant's house. As regards the former, the defendant is clearly liable, and so far as the damp arises from the latter cause, he is, we submit, also liable.

In *White v. Jameson* ⁽³⁾ your Lordship held that where the occupier of lands granted a license to another to do certain acts on the land, and the licensee in doing them committed a nuisance, the occupier might be made a defendant in a suit to restrain the nuisance. On the same principle the defendant is liable in respect of any nuisance which he allows to continue, by whomsoever caused.

Southgate, Q.C., Philbrick, Q.C., and Romer, for the defendant: The case of *Ball v. Ray* does not apply, for there is no evidence here of noise arising from the horses in the defendant's stables sufficient to justify the interference of the court.

*As to the damp, the fact of some predecessor in [697 title of the defendant having erected the stables on a mound of made earth on a higher level than the plaintiffs' house cannot make the defendant answerable. A man cannot be liable in such a case for acts which he has not done, or which he has not himself permitted others to do, as in *White v. Jameson* ⁽⁴⁾.

In *Gaunt v. Fynney* ⁽⁵⁾, where there was only a small amount of annoyance in a case between the owners of adjoining houses, and it was proved to have existed a long time, the court refused to interfere.

In this case the evidence on both points fail to support the plaintiff's contention, and even assuming the nuisance to exist, the plaintiffs have no remedy against the defendant.

⁽¹⁾ Law Rep., 8 Ch., 467.

⁽²⁾ Cro. Jac., 555.

⁽³⁾ Law Rep., 18 Eq., 303.

⁽⁴⁾ Law Rep., 18 Eq., 303.

⁽⁵⁾ Law Rep., 8 Ch., 8.

JESSEL, M.R., after some remarks about conflicting statements in the evidence, continued :

The position of the defendant is a remarkable one. The original plaintiffs were the owners of a house in St George's Terrace, Primrose Hill. The defendant is the lessee of the house standing immediately above the plaintiffs' house. He is in a very unfortunate position. He has taken a house, with a stable adjoining, at a high rent, and on the usual terms. He has literally done nothing; what he may have omitted to do I may come to presently; but he has done nothing at all except to occupy the house and stables in the usual way, and he finds himself, no doubt to his great annoyance, defendant to a Chancery suit. On the other hand, the original plaintiffs seem to be trustees for some persons of this house; they find their house seriously injured, as they consider, by damp, and not unreasonably, for the injury seems to be considerable. They find their tenant threatening to go away on account of the damp, and on account of the noise which was inflicted upon him by the horses in the defendant's stables. And, thinking they were not very likely to get another tenant, they instituted this suit to protect the property of which they were trustees.

The complaints are two. The first complaint is that of noise. The plaintiffs say the noise is so great caused by the 698] horses in *the defendant's stables, as to prevent the ordinary comfortable use and enjoyment by a tenant of the plaintiffs' house.

On the case being opened there was an objection made that the house owners could not be properly plaintiffs in such a case, the noise being a temporary one caused by the horses, which might cease at any moment when the horses were withdrawn. As that has some bearing on the question of costs, I must say what I did on that occasion. Thinking, as I do, that the objection was a valid one, according to the cases of *Mott v. Shoolbred* (1) and *Jones v. Chappell* (2), I gave the plaintiffs leave to amend by adding as co-plaintiff the tenant of the house, which they did. I must consider that as having some bearing on the question of costs, for if that were the only ground of complaint, and they had come here with a wrong plaintiff, it would be very difficult to make the defendant pay costs, he being right up to the moment of amendment.

The next ground of complaint is damp. The plaintiff's bill, as originally framed, alleged as follows: [His Lordship then read the 9th paragraph of the original bill, and con-

(1) Law Rep., 20 Eq., 22.

(2) Law Rep., 20 Eq., 539.

tinued:] That complaint, I believe, is wholly unfounded. It turns out on investigation that the two walls practically touch, that there is a sort of roof covering the interstice between the walls, and that no damp can get through that way. Therefore, so far as the original bill was concerned, the defendants would have had a defence on the ground that that was not the thing which caused the mischief.

The bill has been amended twice, and the last time by special leave. I think it is the duty of the court to avail itself of the means placed at its disposal by the new act of Parliament, and to allow amendments with a liberal hand, so as to really put the facts in issue. But, at the same time, in doing this when those amendments cause a new case to be made, that is, a new case which the defendant had not his attention drawn to before, I think it ought somewhat to influence the costs.

The bill as amended put it thus: [His Lordship then read the passage from the amended bill before set forth.]

There is a third question, which I must mention with regard to the costs, because, as a rule, I make the costs follow the result, and unless I find there are special and peculiar reasons I shall *always do so. The third [699 ground is this: It is a case of peculiar hardship as regards the defendant. As I said before, he has done next to nothing. The only act of omission you can charge him with is that, on investigation, it turns out (a thing which of course he did not know) that the soil pipe in the stables was broken, and that a considerable leakage came from that and leaked through the earth, and increased the dampness of the plaintiffs' wall, and no doubt increased very much the offensiveness of the dampness. Beyond that he has done nothing directly or indirectly, and I must say it is a case of extreme hardship against him; and I think, in considering costs, the question of hardship is not wholly irrelevant. It is quite irrelevant on a question of law, and it has always been so treated by me; but on the question of costs I do not think it is quite to be overlooked. Therefore, while I give my judgment, as I am bound to do, against him, I do not intend to make it a judgment with costs.

The remaining facts of the case are very few, but I am of opinion that it is shown that when the original house of the plaintiffs was built, what is called the made earth on the plan was not there. I have as regards that the evidence of Mr. Moore, the architect who superintended the building. I have also the presumption of circumstances, for I think it is extremely likely that what is called the dry area was

built up to the surface, as the architect says it was, and it therefore appears to me to be fairly proved, and also fairly inferred, that made earth was not there. I, therefore, have come to the conclusion, that the defendant, or rather his predecessors in title, for he certainly did not do it, put the made earth there. That made earth, therefore, is an artificial erection, or artificial work. That is the first conclusion I come to on the question of fact.

The second conclusion I come to on the question of fact is, that if the made earth had not been there, and if the soil pipe had not been broken, the dampness in question would not have arisen; in other words, I consider the dampness to arise from the contiguity of the made earth, and the nature of it to be altered, and the extent of it to be increased, as Mr. P'Anson says, by the defect in the soil pipe. The result is, that the defendant must be held liable. 700] As I understand, in the case of the soil pipe there *is no question about it, but as regards the wet, where does the wet come from? I have no doubt it comes in part, if not entirely, from the water used in washing the horses, and so on, for a great deal of water is used in stables. It was suggested to me it might come from the rain, and therefore that word was put in the bill; but it appears to me the most probable origin of the water is the water used in the stable. But however it comes, if it comes through an artificial work which collects it, in the nature of a large artificial sponge, which absorbs it and keeps it together, until it oozes out by reason of the nature of the sponge, it appears to me I have to say that an artificial work, a work made by man, is a work which if it causes a nuisance is a thing for which the owner of the land is responsible. That is what it comes to.

Now Mr. Campbell, who was examined on other points, also said, as regards this made earth, of course it would give away water in a very different manner from virgin clay which had never been disturbed, and he does confirm the view I should have taken independently of his evidence, that the made earth was the chief cause of the mischief, perhaps not the sole cause. That being so, I think, both on principle and authority, the lessee in possession of the house where the artificial work is ought to be responsible for the nuisance occasioned by the existence of that artificial work. Therefore, even independently of the soil pipe, I should have thought, and still think, the defendant must be liable to put an end to the nuisance.

[His Lordship then reviewed the evidence as to the drain-

age from the stable, independently of the soil pipe, and added:]

The result is this: To some extent, although probably to a slight extent, the water is flavored or scented by the stable manure; to what extent is another matter. But no doubt to that extent it is a slight aggravation of the principal cause of injury, and to whatever extent it may be, to that extent of course must the defendant be responsible. Taking it altogether, I think the defendant is responsible for such damage, for I am satisfied on the evidence; but I am glad to see that at a comparatively trifling expense—compared to the costs of this suit I am sure very trifling—that injury can be remedied.

I come now to the second branch of the case—the noise. It is *very hard on the defendant, who is a gentleman [701 with three horses in his stable, and whose horses do not appear to make more than the ordinary noise that horses do, if he is not to be allowed to keep his horses in his stable. On the other hand, it is very hard on the plaintiffs if they cannot sleep at night, and cannot enjoy their house, because the noise from the stables is so great as seriously to interfere with their rest and comfort. The question is, on which side the law inclines?

If there were no authority on the question I should have felt no difficulty about it, because I take it the law is this, that a man is entitled to the comfortable enjoyment of his dwelling house. If his neighbor makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling house, so as to cause serious annoyance and disturbance, the occupier of the dwelling house is entitled to be protected from it. It is no answer to say that the defendant is only making a reasonable use of his property, because there are many trades and many occupations which are not only reasonable, but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling houses, so as to interfere with the comfort of their inhabitants. I suppose a blacksmith's trade is as necessary as most trades in this kingdom; or I might take instances of many noisy and offensive trades, some of which are absolutely necessary, and some of which, no doubt, may not only be reasonably followed, but to which it is absolutely and indispensably necessary for the welfare of mankind that some houses and some pieces of land should be devoted; therefore I think that is not the test. If a stable is built, as this stable is, not as stables usually are, at some distance from dwelling houses, but next to the wall

of the plaintiffs' dwelling house, in such a position that the noise would actually prevent the neighbors sleeping, and would frighten them out of their sleep, and would prevent their ordinary and comfortable enjoyment of their dwelling house, all I can say is, that is not a proper place to keep horses in, although the horses may be ordinarily quiet.

As regards this part of the case, I think the case of *Ball v. Ray* (1) is an authority, if authority were wanting. No 702] doubt in **Ball v. Ray* (1) there was a circumstance of aggravation, if I may use the term. The stable in that case had been originally a dwelling house next door, but it does not appear to me to make any difference in law; a man has a right to turn his dwelling house into a stable, or his stable into a dwelling house. That is not the question. The only question which had to be considered there was whether he had a right to make a noise in the stable, so placed as that stable was, which interfered with the use and enjoyment of his neighbor's dwelling house, and in that respect Lord Justice Mellish said (2), "That when in a street like Green Street the ground floor of a neighboring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbor's house, or the noise of neighbor's children in their nursery, which are noises we must reasonably expect, and must to a considerable extent put up with. A noise of this kind, if it materially disturbs the comfort of the plaintiff's dwelling house, and prevents people from sleeping at night, and still more, if it does really and seriously interfere with the plaintiff's trade as a lodging house keeper, beyond all question constitutes an actionable nuisance."

The test, therefore, is, whether the stables are unluckily so situated as that the noise from the horses, not being uncommon horses in any way, materially disturbs the comfort of the plaintiffs' dwelling house, and prevents the people sleeping at night. In this case we have overwhelming evidence. There are six witnesses called for the plaintiffs, three of whom have been cross-examined; the other three were not, but there is no reason to impeach their testimony, except upon this ground. It may be said, perhaps, that occasionally some expressions in the affidavits were a little rhetorical, but a person suddenly awoke out of his sleep may not be able accurately to distinguish the kicking of horses, and even the noise of thunder; but there is no reason whatsoever to doubt their testimony, and it is confirmed by a practical experiment performed by Mr. P'Anson,

(1) Law Rep., 8 Ch., 467.

(2) Law Rep., 8 Ch., 471.

who actually only put in the stable a piece of wood with a horse's shoe attached, and when that was struck upon the ground he heard it on the second floor front; showing that it is distinctly heard, from the position of the stable, pretty well all *over the plaintiffs' house. I have no [703 doubt, therefore, upon the facts, that it is a serious annoyance.

It only remains to mention the form of the judgment, and as to that I think the plaintiffs are entitled to an injunction to prevent the defendant from keeping or suffering any horses in his stable—describing it—so as to occasion any nuisance to the plaintiff Milner or his family. That was the form which was adopted in *Ball v. Ray* (').

Then I think he is also entitled to a declaration that the defendant is liable for not preventing the damp and moisture from going through the flank wall of the plaintiffs' house, by reason of any made earth, or other artificial construction existing on the defendant's premises, or by reason of any leakage in any soil, pipe, or drain-pipe upon the defendant's premises. With that declaration, and with an undertaking by the defendant, which he is willing to give, to execute, or cause to be executed, such works as shall be reasonably required for the purpose of preventing such nuisance or damp coming through the plaintiffs' wall so as to occasion a nuisance, the nature of such work to be decided upon by the judge in Chambers if the parties differ, I think it will not be necessary to make any further decree, or grant an injunction, but there will be liberty to apply. For the reasons I have mentioned, I give the judgment without costs.

Solicitors for plaintiffs: *W. & J. Gibson*.

Solicitors for defendant: *Phillips & Son*.

(') Law Rep., 8 Ch., 472.

See 6 Eng. Rep., 440 note.

Every one has a right to the air on his premises uncontaminated by the occupants of other property, though those who live in a city cannot insist on the complete immunity from all interference which they might have in the country. But the occupant of city property cannot justify throwing into the air in and around his neighbor's house any impurity which there are known means of guarding against: *Cartwright v. Gray*, 12 Grant's (U.C.) Chy., 399.

It is a plain common law right to

have the free use of air in its natural unpolluted state, and an acquiescence in its being polluted for any period short of twenty years, will not bar that right; to bar the right within a short period, there must be such encouragement or other act by the party afterwards complaining as to make it a fraud in him to object: *Radenhurst v. Coate*, 6 Grant's (U.C.) Chy., 139.

See *Campbell v. Seaman*, 68 N. Y., 568.

That persons have come to live within the scope of a nuisance after the same had been created, will not

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prevent their complaining of it as a public nuisance: *Queen v. Brewster*, 8 Upper Can. Com. Pl., 206.

See *Campbell v. Seaman*, 63 N. Y., 568; *McCollum v. Germantown*, etc., 54 Penn. St. R., 40.

Where a lawful business, such as that of a tinsmith and sheet-iron worker, is carried on at unseasonable hours to the annoyance and discomfort of neighbors, and until it becomes a nuisance, equity will interfere by injunction to restrain it: *Dennis v. Eckhardt*, 2 Am. Law. Reg., N.S., 166; *Gill v. Bradley*, 1 Lutwyche, 29; *Mumford v. Woolverhampton*, etc., 1 Hurl. & Norm., 84; *Davidson v. Isham*, 9 N. J. Eq. (1 Stockt.), 186; *Fish v. Dodge*, 4 Den., 311; *Dargan v. Waddell*, 9 Iredell (N.C.), 244; *Sheetz's Appeal*, 35 Penn. St. R., 88; *McKeon v. See*, 4 Rob., 467.

As the atmosphere cannot rightfully be infected with noxious smells or exhalations, so it should not be caused to vibrate in a way that will wound the sense of hearing. Noise caused by the ringing of church bells, if sufficient to annoy and disturb residents of the neighborhood in their homes and occupations, is a nuisance, and will be enjoined: *Harrison v. St. Mark's Church*, 3 Weekly Notes of Cases, 384; 15 Alb. Law. Jour., 348. Many cases were cited by counsel.

Offensive vapors from the manufacture of illuminating gas may be a nuisance: *Watson v. Gas Co.*, 5 Upper Can. Q. B., 262; *Carhart v. Auburn*, etc., 22 Barb., 297; *Pottstown Gas Co. v. Murphy*, 39 Penn. St. R., 257.

One is answerable for percolation by fluids of an adjoining owner's well: *Pottstown*, etc., *v. Murphy*, 39 Penn. St. R., 257.

A pigsty in a city is, *per se*, a nuisance.

It is no defence to an indictment for a nuisance, in a city, that it has been conducted in the same place for a long series of years, as no nuisance can be justified by prescription; nor that it has become necessary to the community in which it is situated. A nuisance in a city is not the less obnoxious to indictment from the fact that it is connected with a large and flourishing manufacture.

Where an indictment charged that a

defendant fed a large number of hogs with "slops, fermented grain, the offals and entrails of beasts, and other filth," by means whereof a nuisance, etc., was created, and the evidence showed that the hogs were fed exclusively on slops, it was held that there was no variance: *Com. v. Van Sickle*, 7 Penn. L. J., 82, 4 Penn. L. J. Rep., 104, bottom paging.

So noxious gases, generated in burning brick, which are borne upon adjoining lands of a neighbor, injuring and destroying his ornamental trees and vegetation, which are articles of luxury only: *Campbell v. Seaman*, 63 N. Y., 568.

Nor is it a defence that the injury is only occasional when the winds are in a direction to carry the gases on the plaintiff's premises: *Campbell v. Seaman*, 63 N. Y., 568.

The defendant erected, in the city of Kingston, a planing machine and a circular saw, driven by steam, and was in the habit of burning the pine shavings and other refuse: he took no means to consume or to prevent the smoke, and it being carried to the plaintiff's premises in sufficient quantities to be a nuisance, the defendant was decreed to desist from using his steam engine in such a manner as to occasion damage or annoyance to the plaintiff from the smoke: *Cartwright v. Gray*, 12 Grant's (U.C.) Chy., 399.

A business which is necessary and useful in large communities, and which is not a nuisance of itself, may become so in view of the circumstances in the neighborhood in which it is proposed to carry it on.

There is a distinction between a long established business, which has become a nuisance in a locality from the increase of population, etc., and a new erection threatened in such vicinity.

Carrying on an inoffensive trade for any number of years in a place remote from buildings and public roads, does not authorize its continuance there when houses have been built, and roads laid out, and it is a nuisance to the occupants and travellers.

It requires a much clearer case for the chancellor to compel the removal of an establishment in which the owner has invested his capital and carried on business for a long time,

than of one to be established for the first time against notice that there will be an application to equity to prevent it.

The legislature has recognized that the storing of gunpowder in large quantities in thickly settled places is a nuisance, to be guarded against by public authority.

The erection of a powder house *may* be restrained, without the existence of actual irreparable damage, but to prevent it: *Wier's Appeal*, 74 Penn. St. R., 230.

Twenty years' user will legitimate an easement affecting private property, but not a nuisance: *Queen v. Brewster*, 8 Upper Can. Com. Pl., 208.

See *McCollum v. Germantown*, etc., 54 Penn. St. R., 40; *Campbell v. Seaman*, 63 N. Y., 568.

A party had carried on the business of a soap and candle manufactory for several years without any steps being taken to restrain him, after which a bill was filed for that purpose, on the ground of nuisance and inconvenience to the party complaining: the court, under the circumstances, refused a motion for an interlocutory injunction; but reserved the question of costs to the hearing: *Radenhurst v. Coate*, 6 Grant's Chy., 139.

In 1861, while defendant was engaged in erecting buildings for a tannery on land adjoining the plaintiff's premises, the plaintiff encouraged the defendant to proceed with his project; the buildings were proceeded with, and business in them was commenced the same year: in 1863 additions were made to the buildings with the plaintiff's knowledge and acquiescence; and plaintiff made no complaint about the business until 1868, though all this time it had been carried on, and the plaintiff had been residing on the premises adjoining: Held, that by his

conduct he had debarred himself from relief in equity, on the ground of a tannery being a nuisance: *Heenan v. Dewar*, 17 Grant's (U.C.) Chy., 638, affirmed 18 id., 438.

If the plaintiff desire to recover for the diminished value of his premises from offensive vapors he must plead such loss. Where the plaintiff alleged that the defendant had annoyed him by offensive odors from a barnyard placed by the defendant near his dwelling house, and that he was prevented by them from a comfortable use of his house, that his family were made sick thereby, and that he was subjected to medical expenses in consequence: Held, that he could not under this declaration, for the purpose of enhancing the damages, show the diminished value of his dwelling house and lot by reason of the offensive odors: *Johnson v. Porter*, 42 Conn., 234.

The defendant having erected a stable on his own ground, adjoining a dwelling house owned by the plaintiff and rented to one W.: Held, that this was not such a nuisance as would support an action by a reversioner, though it was shown that he had been obliged in consequence of it to accept a lower rent for his house: *Laurason v. Paul*, 11 Upper Can. Q. B., 534.

Though the stamping of horses in a stable may become a nuisance: *Dargan v. Waddell*, 9 Iredell (N.C.), 244.

If plaintiff had a cause of action at the commencement of his action it is no defence that the works are subsequently well managed, and that the vapors complained of unavoidably arise: *Watson v. Gas Co.*, 5 Upper Can. Q. B., 262.

A party cannot justify as agent of another for maintaining a public nuisance: *The Queen v. Brewster*, 8 Upper Can. Com. Pl., 208.

[2 Chancery Division, 706.]

V.C.M., March 31, 1876.

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*AGAR V. GEORGE.

Marriage Settlement—After-acquired Property—Contingent Interest—Inclusion of Existing as well as Future Property.

By a post-nuptial settlement a husband covenanted to settle any property to which the wife, or he in her right, either then was or at any time during the coverture should become entitled to:

Held, that a contingent interest in a fund standing in court to the credit of a cause, which fell into possession after the termination of the coverture, was bound by the covenant.

UNDER the decree in this suit a fund had been paid into court and invested, representing a legacy of £70,000 given to a class of persons by the will of Lord Callan, who died on the 9th of October, 1815.

One of the persons interested in the fund was Mrs. Georgiana Ellis Cole, who at the time of her marriage with Henry Cole, which took place on the 28th of May, 1837, was entitled in expectancy, on the death or second marriage of her mother, to one equal third share of a sum of £13,798 5s. 11d. consols, which formed part of the £70,000 legacy, and in possession to a sum of £761 3s. 2d. consols, part of the same fund, and was also entitled contingently on the death without issue of David Samuel Agar, who was interested in another portion of the fund, to an aliquot share of such portion, which, when it ultimately fell in, amounted to £1,058 15s. 2d. consols.

A post-nuptial settlement was executed, dated the 21st of August, 1857, by which, after reciting the interest of Mrs. Cole in the £13,798 5s. 11d. consols and the £761 3s. 2d. consols, and that the husband had agreed to execute an assignment of the first fund and of £561 3s. 2d. consols, part of the second fund, and to enter into the covenants on his part in manner thereafter contained, and that it was the intention of himself and his wife to apply to the Court of Chancery for a transfer to him of £200 consols, the remainder of the second fund, the two funds were assigned to three trustees, of 707] whom the present petitioners were the survivors *upon trusts for investment and payment of the income to the wife during the joint lives of both for her separate use without power of anticipation, and to the survivor during his or her life, and then upon trusts for the children as therein mentioned. And the settlement contained a covenant that if Mrs. Cole then was, or if at any time or times during the

marriage she or Henry Cole in her right should become entitled by descent, transmission, devise, bequest, gift, representation, purchase, or otherwise, to any real or personal property to the value of £250 or upwards for any estate or interest whatever (except jewels and so forth), and also if the application to the Court of Chancery for transfer to Henry Cole of the said sum of £200 consols should not be entertained by the court, then and in every such case the said Henry Cole and Georgiana Ellis Cole and their respective heirs, executors, and administrators, and all other necessary parties, should, at the cost of the trust estate, as soon as circumstances would admit, and to the satisfaction of the trustees of the settlement, convey, assign, surrender, or assure the said real or personal property, or otherwise cause the same to be well and effectually vested in the said trustees or trustee for the time being of the settlement, and also should consent to or make the necessary application for transferring the sum of £200 consols to the same trustees or trustee upon trust for investment thereof, and for the application of the same property upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisos, agreements, and declarations expressed and contained in the settlement concerning the £13,798 5s. 11d. consols, or as near thereto as the deaths of parties and the other circumstances would admit of.

Mrs. Cole died on the 4th of August, 1859, leaving Henry Cole surviving.

David Samuel Agar died on the 9th of March, 1874, without ever having been married, and thereupon, under an order in the suit made on the 3d of July, 1874, a sum of £1,058 15s. 2d. consols was carried over to an account in the suit of "The trustees of the settlement or legal personal representatives of the late Georgiana Ellis Cole, deceased."

The trustees of the settlement now petitioned for the payment out of court to them of the fund.

**J. Pearson, Q.C., and Stallard*, for the petitioners: [708 The question is whether a contingent interest in property comes within a covenant to settle after-acquired property, which includes all then existing, as well as future property of the wife. This was in effect so decided by *Caldwell v. Fellowes* (1), where, under a covenant to settle after-acquired property, a contingent interest in joint tenancy in real estate was held to be severed.

Kekewich, for Henry Cole: It is, in the first place, clear that this fund is not within the words of futurity in the cov-

(1) Law Rep., 9 Eq., 410.

enant, and unless it can be treated as property to which the wife was entitled at the time of the settlement, it goes to the husband in his marital right: *Atcherley v. Du Moulin* (¹); *In re Pedder's Settlement Trusts* (²). The existence of this contingent interest must have been known when the settlement was made, and it must be presumed that the parties intended to exclude it, or it would have been expressly named; and words expressive of a present interest do not include one that is contingent: *Dering v. Kynaston* (³).

[MALINS, V.C.: There were two cases before me in which I held that, in the absence of words to the contrary, it must be assumed that such a covenant related only to property acquired during the coverture.]

Pearson, in reply: Those cases were *Dickinson v. Dilwyn* (⁴) and *Carter v. Carter* (⁵), which were affirmed by the Court of Appeal in *In re Edwards* (⁶), in preference to *Stevens v. Van Voorst* (⁷), which they overruled. But those were cases in which there were no words pointing to the inclusion of property to which the wife was entitled at the date of the settlement. *In re Mackenzie's Settlement* (⁸) is more like this case than *Dering v. Kynaston*, and it appears not to have been cited in the latter case. Lord Justice 709] *Turner, in his judgment in that case, treats the principle as directly applicable to the case of contingent interests to which the wife was entitled at the date of the settlement. *Caldwell v. Fellowes* (⁹) really covers the present case, the estate there, though contingent, being affected in devolution by the settlement.

[MALINS, V.C.: *In re Mackenzie's Settlement* (⁸) seems inconsistent with *Dering v. Kynaston* (³).]

Kekewich: In *In re Mackenzie's Settlement* the interest in question was reversionary, not contingent, and it cannot be cited in opposition to a decision that a contingent interest would pass under the covenant.

MALINS, V.C.: I confess I am very glad to find that I am not bound by *Dering v. Kynaston*, because it does not commend itself to my mind; but I think I am quite relieved from it, because I consider *In re Mackenzie's Settlement* inconsistent with it. I invited Mr. Kekewich to show me that the two cases could stand together, and he has failed to do so.

Dering v. Kynaston was the case of a covenant in a marriage settlement to settle all the property to which the hus-

(¹) 2 K. & J., 186.

(²) Law Rep., 10 Eq., 585.

(³) Law Rep., 6 Eq., 210.

(⁴) Law Rep., 8 Eq., 546.

(⁵) Law Rep., 8 Eq., 551.

(⁶) Law Rep., 9 Ch., 97.

(⁷) 17 Beav., 305.

(⁸) Law Rep., 2 Ch., 345.

(⁹) Law Rep., 9 Eq., 410.

band and wife, or either of them, were or was at the date of the settlement, or should during the coverture become possessed, and it was held only to include indefeasibly vested estates, and therefore not to include the wife's interest in real estate, which at the date of the settlement stood limited in such a manner that the wife's interest was then contingent only and fell into possession after the termination of the coverture by the death of the husband. Therefore if that had been the only decision it would have covered the present case.

But the Court of Appeal in *In re Mackenzie's Settlement* has decided that a contingent interest in property is within such a covenant. This is, in my opinion, clear from the judgment of the Lord Justice Turner in that case. He says ('): "In my *opinion this covenant was intended [710 to reach, and does reach, all property in which the appellant had at the time of the marriage any estate or interest, if the property itself, as distinguished from the estate or interest which the appellant had in it, was of the value of £400. The covenant was intended, I think, to sweep in every interest which the appellant had in property of that value. The terms of the covenant seem to me plainly to import this. They are 'if she is, or if she becomes, entitled to property of the value of £400 for any estate or interest whatever.' Could it be said that if she was entitled contingently, or under an executory devise or bequest, to property of larger value the covenant would not reach it? And, surely, if property thus circumstanced would be reached by the covenant, property in which she had a vested reversionary interest would also be reached by it."

The clause in the present case includes all property to which the wife was entitled at the date of the settlement, or to which she might become entitled during the coverture. This was property of more than £250 value, to which she was contingently entitled at the date of the settlement.

I am clearly of opinion that in principle it is included in the settlement, and that the case is covered by the authority of *In re Mackenzie's Settlement* ('). I, therefore, hold that it is bound by the settlement.

Solicitors: *Duncan, Murton, Warren & Gardner.*

(') Law Rep., 2 Ch., 348.

(*) Law Rep., 2 Ch., 345.

[2 Chancery Division, 711.]

V.C.M., April 7, 1876.

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*FANE V. FANE.

[1875 F. 32.]

Jurisdiction—Heirlooms—Sale apart from Land—Tenant for Life and Remainderman.

The court has jurisdiction to order a sale of heirlooms apart from the land to which they are attached for the purpose of paying off mortgages, and will do so at the instance of a tenant for life where satisfied that it will be for the benefit of the parties interested that they should be sold, even where there are infant tenants in tail in remainder.

THIS was a petition by the plaintiff in the suit, who, under limitations contained in the will of Lady Cecil Jane Georgiana Fane, was tenant for life of certain estates in Somersetshire, with remainder to his first and other sons in tail, with remainders over.

The will, which was dated the 1st of June, 1870, contained a clause in the following words: "I give all my other pictures and all my engravings, and my china, my diamonds (including a brooch with a very large emerald), and the Irish service of plate with the two gold ice pails, and my books, and all the furniture and effects in my mansion house at Brympton to be settled as heirlooms as long as the rules of law will permit, and to be enjoyed by the person for the time being entitled to my said estates in Somersetshire. And I direct my executors to make an inventory of all such pictures, engravings, china, diamonds, plate, books, furniture, and effects. I declare that no part of my estates in the county of Somerset shall be sold except for the purpose of paying debts owing by me or legacies given by this my will or any codicil thereto, and no part of the same estates shall be sold even for the purpose of paying such debts or legacies until all my other real estate whatsoever and all the residue of my personal estate not specifically bequeathed has been first sold and the produce applied towards the payment of such debts and legacies."

The testatrix died on the 4th of December, 1874.

The Brympton estate consisted of a large mansion house and about 1,235 acres of land, which produced an income of about £3,000 a year, but at the death of the testatrix it was 712] subject to *mortgages amounting to £32,070, the interest of which absorbed half the income from the property. The testatrix's personal estate was only sufficient to keep down certain annuities charged upon it.

The real estates of the testatrix other than the Brympton

estate were sold, and out of the proceeds of the sale a sufficient fund was provided to reduce the charges on the Brympton estate to about £24,000. But the petitioner found that the net income of the estate, after providing for interest on the charges, did not enable him to keep up the mansion house in a proper state. It was estimated that about £7,000 would be produced by the sale of the heirlooms, and the petition asked that they might be sold and the proceeds applied towards the reduction of the mortgages.

J. Pearson, Q.C., and T. H. Robertson, for the petitioner.

H. A. Giffard, for trustees and infant tenants in tail in remainder: There would, no doubt, be power to sell heirlooms for the payment of debts. The difficulty here is that there is no occasion to resort to them for that purpose. But probably it would be for the benefit of all parties to sell them if it can be done.

MALINS, V.C.: A case of *Vansittart v. Vansittart*, in which a similar point arose, came before me on the 24th of February last, and I held that I had jurisdiction to order heirlooms to be sold. The order will now be in the same form: "The court being of opinion that it will be for the benefit of all parties that the heirlooms should be sold, direct them to be sold."

Solicitors: *Frere, Forster & Frere*.

[2 Chancery Division, 718.]

V.C.M., April 28; May 5, 1876.

***In re STEAD'S MORTGAGED ESTATES. [713]**

Statutes of Limitation—Equitable Mortgage—Arrears of Interest—3 & 4 Will. 4, c. 27, s. 42; 3 & 4 Will. 4, c. 42, s. 3—Tacking—Money in Court under the Lands Clauses Consolidation Act.

Money paid into court under the Lands Clauses Act for purchase of land which was subject to an equitable mortgage by deposit, with a memorandum undertaking to give a legal mortgage; on petition by the mortgagee for payment out:

Held, that the analogy of the Statutes of Limitation applied, and that only six years' arrears of interest could be charged.

Edmunds v. Waugh (1) explained.

THIS was a petition by the assignees of an equitable mortgage for £400 and interest at 5 per cent.

The £400 was originally borrowed by one Richard Stead, of Leeds, from John Swaine, of the same place, and was, with the interest, secured by the promissory note of Richard Stead to John Swaine, of the same date and for the same amount, and by the deposit with John Swaine of the title

(1) Law Rep., 1 Eq., 418.

deeds of the Harpers' Arms public house in Harper Street, Leeds, then belonging to Richard Stead.

The deposit was accompanied by the following memorandum in writing: "Memorandum that the several title deeds and writings relating to an estate belonging to me and situate in Harper Street, in Leeds, in the county of York, together with a promissory note for £400, and given to John Swaine, are deposited and given to him for securing £400 and interest on demand, being money lent by him to me; and I hereby undertake to give a mortgage upon the said estate if required by the said John Swaine, his executors or administrators. Dated this 8th day of January 1857. Richard Stead."

Richard Stead, by his will, dated the 15th of July, 1857, devised all his real and personal estate to three trustees, as to the Harpers' Arms public house, upon trust that his trustees, their heirs and assigns, should stand seised and possessed thereof to the use of such person or persons as his daughter Mary Elizabeth Milner, the wife of James Milner, of Leeds, should, independently of her husband, 714] *his debts, control, or engagements, by deed or will, direct, limit, or appoint; and in default of such appointment, to the use of Mrs. Milner in fee simple.

Richard Stead died on the same 15th of July, 1857, and by a deed of the 5th of November, 1864, the mortgage debt and security were assigned to the petitioners, and the title deeds of the property were handed over to them.

The corporation subsequently required to take the Harpers' Arms public house under the powers of the Leeds Improvement Act, 1872, and served upon Mrs. Milner the usual notice to treat. On the 7th of February, 1876, they agreed with her to purchase the property for £1,050.

No interest had ever been paid upon the mortgage debt, and the full amount of principal and interest remained due since the date of the advance. Mrs. Milner was unable to make a title, not having access to the deeds, and the corporation, being desirous of taking possession, paid the purchase-money into court.

The petition asked for payment to the petitioners of the principal sum and interest from the date of the advance, as well as the petitioner's costs.

Higgins, Q.C., and *J. T. Humphry*, for the petitioners: The effect of the Statute of Limitations is not to extinguish the interest, but merely to bar the right to recover it by suit or other proceeding. And where it can be received without such proceeding the mortgagee has a right to receive

and retain it for the full period of twenty years: *Edmunds v. Waugh* ('). *Mason v. Broadbent* (') will be relied on as showing that the mortgagees are only entitled to six years' interest. But the distinction between that case and the present is that here no suit is necessary to establish the right to the mortgage money. *Edmunds v. Waugh* shows that a petition for payment of the purchase-money out of court is not such an action or suit.

The petitioners are, moreover, in equity in the position of having a covenant for the repayment of the debt, which would be a necessary part of a legal mortgage, and by virtue of the covenant are entitled to recover twenty years' arrears of interest: *Lewis v. *Duncombe* ('). This [715 is like the case of a mortgagee who, having acquired possession of the money, may retain any number of years of interest. The money being in court, all the petitioners have to do is to show that principal and interest are due to entitle them to recover all the arrears.

Glasse, Q.C., and *Ingle Joyce*, for Mrs. Milner: There is no doubt that an executor can retain for a debt barred by the Statute of Limitations. That was decided in *Courtenay v. Williams* ('), and *Coates v. Coates* ('), and if this had been the case of a mortgagee having money of the mortgagor in his hands, very likely he would be entitled to retain sufficient to recoup himself the principal and all the arrears of interest. But that is not the case of the present petitioners. *Edmunds v. Waugh* (') is said to be an authority for the proposition that a petition such as this is not a proceeding for the recovery of arrears of interest to which the Statutes of Limitation apply. But that was a case of the mortgaged property having been actually sold under the decree in a suit to administer the mortgagee's estate by the exercise of the mortgagee's power of sale, and the petition was by the trustees of that estate for payment of the arrears out of the fund then in court. There the money was in effect in the possession of the mortgagees. In this case, supposing that the corporation of Leeds had not intervened, the mortgagees could not have realized their security except by a suit. And the fund in court represents and is to be treated as respects the rights of parties interested as if it had been the estate itself. This petition is, in fact, the statutory substitute for a suit to determine the rights of the parties. The petitioners here are doing the

(') Law Rep., 1 Eq., 418.

(') 3 Hare, 539.

(') 33 Beav., 296.

(') 33 Beav., 249.

(') 29 Beav., 175.

very thing which Vice-Chancellor Kindersley in *Edmunds v. Waugh* said would only entitle them to recover six years' arrears. They are coming to a court of justice to recover the interest. The mortgagor is in possession in contemplation of law, and this is really a proceeding against land.

The distinction between sect. 42 of 3 & 4 Will. 4, c. 27, and sect. 3 of 3 & 4 Will. 4, c. 42, is explained in *Hunter v. 716* *Knockolds* (¹), *the former relating to personal actions only, and the object of the latter being to relieve land from arrears of charges beyond six years.

Dauney, for the corporation of Leeds.

Higgins, in reply: There is nothing in the words of the Statutes of Limitation extending their operation beyond actions and suits. The word "suit" had a definite and well-understood meaning when the Statutes of Limitation were passed, and the petitioners are not, in this case, in the position of having to institute any suit.

Moreover, the memorandum gives the mortgagee a right to have a legal mortgage, and with a legal mortgage there would be a right, having regard to the statute making devised estates liable for debts, to tack the remaining thirteen years' interest to the debt: *Darby and Bosanquet* on the Statutes of Limitation (²); *Elvy v. Norwood* (³). Even a simple contract debt can be tacked: *Rolfe v. Chester* (⁴). If, therefore, it is clear that, as against the mortgagor and his representatives, the mortgagee is entitled to twenty years' arrears, those arrears may be recovered on this petition. The petitioners are in the position of mortgagees with a covenant to pay the debt, because that would be a necessary part of a legal mortgage to which they are entitled under the covenant in the memorandum.

[*Mr. Glasse*: That would not give a right to recover more than six years' arrears: *Shaw v. Johnson* (⁵).]

Shaw v. Johnson is inconsistent with the other cases. But it does not apply to the case of these mortgagees, who are in the same position as if they had a covenant in addition to their charge. This would entitle them to twenty years' arrears of income: *Du Vigier v. Lee* (⁶), and a legal mortgage would contain a power of sale under which they might be in possession of the purchase-money: *Edmunds v. 717* *Waugh* (⁷) is a clear authority both in *support of

(¹) 1 Mac. & G., 640.

(²) Page 150.

(³) 5 De G. & Sm., 240.

(⁴) 20 Beav., 610.

(⁵) 1 Dr. & Sm., 412.

(⁶) 2 Hare, 326.

(⁷) Law Rep., 1 Eq., 418.

the view that the petition is not a suit to which the Statutes of Limitation apply, and also as to the right to tack or retain the whole arrear of interest; and on this point *Elvy v. Norwood* ⁽¹⁾, *Rolfe v. Chester* ⁽²⁾, and *Thomas v. Thomas* ⁽³⁾ are conclusive: Shelford's Real Property Statutes, by Carson ⁽⁴⁾. In this case, it is the remedy only, and not the right, which is barred. The mortgagees require no remedy or relief, because the money is in court, and they cannot be forced to give up the deeds without payment.

MALINS, V.C.: The point raised is one of very considerable importance. I was under the impression last week that the decision of Vice-Chancellor Kindersley in *Edmunds v. Waugh* ⁽⁵⁾ established the principle that, where by any means there was a fund in court out of which the mortgage debt was payable, a petition for payment of the fund out of court was not a suit or other proceeding for the recovery of the mortgage money or interest, within the meaning of the Statutes of Limitation. And if the circumstances of this case had been like *Edmunds v. Waugh*, I should not only have felt myself bound to follow that case, but should have entirely agreed with Vice-Chancellor Kindersley.

But that was a case in which the proceeds of the sale of certain mortgaged premises, sold under the power of sale in the mortgage deed, were standing in court to the credit of a suit for the administration of the estate of the mortgagee. Now it is quite clear that if a mortgagee had the proceeds of the sale of the mortgaged property in his own hands, the legal right of retainer would attach, on the same principle as the right of retainer by an executor for his own debt, and he would be entitled to repay himself the principal, together with arrears of interest for any number of years. And in *Edmunds v. Waugh* the position of the parties was as if the mortgagee had the money actually in his hands as mortgagee, and what Vice-Chancellor Kindersley really dealt with *was the right of retainer, and [718 he held that the petition, which in effect put the mortgagee in possession of funds which really belonged to him, was not a suit to recover interest within the meaning of the Statutes of Limitation.

Now this present case is a very peculiar one. It is that of an equitable mortgagee with a covenant to have a legal mortgage executed. And if the petitioners had real-

⁽¹⁾ 5 De G. & Sm., 240.

⁽²⁾ 20 Beav., 610.

⁽³⁾ 22 Beav., 341.

⁽⁴⁾ Page 252.

⁽⁵⁾ Law Rep., 1 Eq., 418.

ized their security, and there had been a deficiency, they would only have stood creditors against the estate of the mortgagor.

Whether *Elvy v. Norwood* (1) is quite consistent with later decisions, it is not now necessary to give an opinion. If the mortgagee had taken proceedings in this court, or had filed a bill of foreclosure, he could only have recovered six years' arrears of interest. The case would then have been simply *Shaw v. Johnson* (2). But in this state of things, without any action being taken by the mortgagee, the corporation gave notice to treat for the property, and the price was agreed upon. Then, without further communication with the mortgagor, in order to enable them to take possession, they pay the agreed price into court.

Therefore I must regard the money in court as land. It would have followed all the devolutions of land. And the only application is for the money which is the substitute for the land.

Mr. Higgins is right in saying that this petition is not either a distress or action, nor strictly a suit. But inasmuch as at the time the act was passed there was no other proceeding possible than those mentioned, and all the modes of proceeding then possible were enumerated, it must be assumed that if this particular course could then have been taken, it would have been mentioned. But I think that this petition is analogous to a suit for the recovery of land, and therefore that the principal and six years' interest can alone be recovered.

Under all these circumstances, I think the case is not affected by *Edmunds v. Waugh* (3), which went upon the principle of the right of retainer, and that this petition must be treated by analogy as a suit to recover principal and interest. The petitioners, therefore, will receive the principal sum and six years' arrears of interest, and the residue will be carried over to the separate account of Mrs. Milner.

The costs of paying in and taking out the fund will be paid by the corporation.

Solicitors: *Torr & Co.; Richard Smith; Janson & Co.*

(1) 5 De G. & Sm., 240.

(2) 1 Dr. & Sm., 412.

(3) Law Rep., 1 Eq., 418.

[2 Chancery Division, 719.]

V.C.M., May 26, 1876.

In re LETCHFORD.

Infant entitled to Real Estate—Power of Leasing—Intervening Tenancy by the Curtesy—Estate indefeasibly vested—Act of 11 Geo. 4 & 1 Will. 4, c. 65.

The court has power, under 11 Geo. 4 & 1 Will. 4, c. 65, to sanction a building lease of an infant's freehold estate when he is seised in fee simple in reversion after a life estate by the curtesy vested in his father.

THIS was a petition under sect. 17 of the Act of 11 Geo. 4 & 1 Will. 4, c. 65, by an infant, who, as the heir-at-law of his deceased mother, was entitled, subject to an estate for life by the curtesy then vested in his father, to an undivided one-fourteenth part and a third of another undivided one-fourteenth part of certain freehold property in the parish of Cripplegate, in the city of London, seeking for the sanction of the court to a building lease of the property for ninety-nine years. The parties entitled to the other shares in the property were *sui juris*, and had agreed to grant the proposed lease.

Oswald, for the petitioner: The question whether the court had jurisdiction under the act to sanction a lease of an infant's estate, notwithstanding that it was a reversion on an estate by the curtesy, has already been decided in a case of *In re Spencer's Trust*, which came before your Lordship on the 15th of November, 1867.

MALINS, V.C.: That case not having been reported, it does not appear whether *In re Evans* (*) and *Ex parte Legh* (*), in which *it was held that the infant must [720 be indefeasibly entitled either in fee or in tail in possession, were cited.

Glasse, Q.C., *amicus curiæ*, referred to *In re Clark* (*), in which Lord Cranworth had said that the statute ought to be construed liberally, and that the court might sanction a lease, in some cases, of a defeasible estate.

MALINS, V.C.: I am glad to find that there was authority for my decision in *In re Spencer's Trust*, for it appears to me to be a matter of the utmost convenience that a lease should be sanctioned in a case like this; and as I have made the order before, I will make it again. With great deference to Lord Cottenham, I think he took a very narrow view of this act in his decision in *In re Evans* (*). *In re*

(*) 2 My. & K., 318.

(*) Law Rep., 1 Ch., 292.

(*) 15 Sim., 445.

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Boyle v. Bettws Llantwit Colliery Co.

V.C.B.

Clark was subsequent to that decision, and also to *Ex parte Legh* ⁽¹⁾, and shows that the strict construction put upon the statute by those decisions will not be maintained. It appears to me as plain as possible that such a case as the present was intended to be within the act. If not, it would follow that however small a share an infant might have in a property, no lease could be granted of it unless the share was indefeasibly vested in possession, and the object of the act would often be entirely frustrated. This view seems to be entirely borne out by *In re Clark*.

I think, also, that the infant's interest being so small, and all the other parties concurring, the deposit of a counter-part in court may be dispensed with.

Solicitors: *Lovell, Son & Pitfield*.

⁽¹⁾ 15 Sim., 445.

[2 Chancery Division, 726.]

V.C.B., April 6, 1876.

726] *BOYLE V. BETTWS LLANTWIT COLLIERY COMPANY.

[1876 B. 141.]

Company—Voluntary Liquidation—Receiver and Manager—Creditors' Action.

On the application of an unpaid vendor of the property of a company in voluntary liquidation, and unable from insolvency to carry on its works, the vendor was appointed receiver without security or salary.

Perry v. Oriental Hotels Company ⁽¹⁾ distinguished.

MOTION on behalf of the plaintiffs, who were unpaid vendors, for the appointment of a receiver and manager over the property sold by them to the Bettws Llantwit Colliery Company, now under voluntary liquidation.

In June, 1874, the Bettws Llantwit Colliery, of which the plaintiffs were lessees from Lord Abergavenny, was conveyed by them to Sir Wilford Brett and Mr. Heseltine as the trustees and nominees for a company which had been formed to purchase the lease and work the colliery.

It was at the time agreed that part of the purchase-money should remain on mortgage, and that the amount, with interest at 6 per cent., should be secured by a legal mortgage of the colliery and works.

A mortgage was prepared and approved, but had never been actually executed by the trustees on behalf of the company. In the meantime the company had not been successful. The rent fell into arrear, and the freeholder had

⁽¹⁾ Law Rep., 5 Ch., 420.

put in distresses for the *rent due at Michaelmas and [727 Christmas, 1875, the amount due having been afterwards paid by the plaintiffs to prevent a forfeiture of the lease.

At a meeting of the company held on the 15th of March, 1876, a resolution was passed and afterwards registered that, it being proved to the satisfaction of the company that the company cannot by reason of its liabilities continue its business, and that it is desirable to wind up the same, the company be wound up voluntarily, and that Mr. Layton be appointed the liquidator to carry on the voluntary liquidation.

On the 27th of March, 1876, the plaintiffs commenced an action against the company for payment of the balance of their purchase-money (£8,000), with interest; specific performance of the agreement to execute in favor of the plaintiffs a mortgage of the premises; relief on the footing of unpaid mortgagees; the appointment of a receiver and manager; and an injunction to restrain the company from assigning or encumbering the property, and from carrying on or in any manner interfering with the business, property, or affairs of the company.

The plaintiffs now moved for the appointment of a receiver and manager, and for an injunction until the hearing of the action.

The affidavits in support of the motion stated that the property of the company was fast going to ruin for want of repair; that the works were stopped, and the water rising fast; that the company were entirely without funds, and that it would be impossible for the company, or the voluntary liquidator, to reopen the colliery or carry on the workings; and that there was the risk of ejectment by the freeholder. To prevent this risk the plaintiffs were willing to provide funds for opening and working the colliery, and they were willing themselves to be appointed receivers and managers of the property.

No affidavits had been filed on behalf of the company, but since notice of motion had been served the company's solicitor wrote offering to consent to an order in the terms of the notice of motion upon condition that the trustees of the company were indemnified by the plaintiffs.

**Kay*, Q.C., (*Crossley* with him), in support of [728 the motion, contended that, as unpaid vendors, the plaintiffs were entitled to have the property, which was in imminent peril, protected by the appointment of a receiver and manager. They were willing themselves to be appointed and to act, and it was submitted that they were not bound

to give the trustees of the company the indemnity which had been asked on their behalf.

Swanston, Q.C., and *Bradford*, on behalf of the company, opposed the motion: The liquidator who has been appointed under the resolution to wind up voluntarily, is the proper person to act as receiver, and unless he is objectionable—which is not suggested—the court, as a matter of principle, will not appoint any other person in his place: *Perry v. Oriental Hotels Company* ⁽¹⁾.

If the ordinary practice is departed from, it can only be upon the terms of the plaintiffs giving indemnity to the trustees and the company against the rent reserved by the lease under which the plaintiffs hold.

BACON, V.C.: In *Perry v. Oriental Hotels Company* the winding-up was under the supervision of the court, and it was thought unreasonable that there should be two persons to fulfil the office of receiving the rents and profits which the liquidator alone could very well perform; and the same matter came under my consideration very recently in *Campbell v. Compagnie Générale de Bellegarde* ⁽²⁾. Here there is no doubt. The plaintiffs are mortgagees of the colliery, and show a state of facts which may result in the positive destruction of the property. The liquidator has not the means for carrying on the colliery, and is quite powerless to remedy the evil, and if I do not interfere I must suffer the property of the plaintiffs to be entirely destroyed.

If the trustees of the company are entitled to any indemnity they must be indemnified by the company, and cannot call on the plaintiffs to do so. The application of the plaintiffs, who are really the owners of the colliery, and have a 729] right to be appointed *receivers and managers of their property without security and without salary, is perfectly reasonable, and quite consistent with the practice of the court.

MINUTE OF ORDER: Appoint plaintiffs receivers and managers without salary and without security, and restrain defendants from assigning, disposing of, or charging the property of the company.

Solicitors: *Laundy & Son*; *Walter Webb*.

⁽¹⁾ Law Rep., 5 Ch., 420.

⁽²⁾ 2 Ch. D., 181.

[2 Chancery Division, 753.]

M.R., March 27, 28 : C.A., April 7, 1876.

*DAWSON V. OLIVER-MASSEY.

[753

[1869 D. 37.]

Will—Gift to Class in Remainder—Period of Distribution—Ascertainment of Class—Marriage with Consent of Parents—Impossible Condition.

A testator bequeathed a fund to trustees upon trust, after the determination of a life interest, to pay and transfer the trust property equally among the female children of his sister on their attaining twenty-one or marrying with the consent of their parents. At the death of the tenant for life the testator's sister was a widow and had two daughters, the elder of whom afterwards married while under age, with the consent of her mother:

Held, that the class to take must be ascertained when the first member became absolutely entitled to a share :

Held (reversing the decision of the Master of the Rolls), that the consent mentioned in the will must be taken to be that of the parents or parent if any, and that the daughter who had married with the consent of her surviving parent took a vested interest in the fund.

AUGUSTUS SHAKESPEAR OLIVER-MASSEY, by his will, dated the 5th of November, 1862, after bequeathing some pecuniary legacies of large amount, devised and bequeathed unto and to the use of Thomas James Brown and Richard Dawson, their heirs, executors, administrators and assigns respectively, the residue of his personal property and all his real property and estate, upon trust out of the annual income and produce thereof to pay to certain persons therein named, during their respective lives, the annuities therein mentioned ; and, subject to the said annuities, to pay the residue or the whole, as the case might be, of the said annual income and produce to Richard Mansel Oliver-Massey during his life, and after his decease upon the following trust : " Upon trust to pay, transfer, and convey the said trust property and estate, and the annual income and produce thereof, to be equally divided amongst the female children of my sister Madeline Elizabeth Sheriffe, share and share alike, on their attaining the age of twenty-one years or marrying with the consent of their parents, for their sole and separate use, free from the debts and control of any husband with whom they may intermarry, their receipts alone to be sufficient discharges for the same." In other parts of the will the testator spoke of the " trustees or trustee."

*The testator died in August, 1865. He was entitled to very considerable real and personal estate. [754

Richard Mansel Oliver-Massey died in September, 1870.

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Dawson v. Oliver-Massey.

C.A.

The testator's sister, Madeline Elizabeth Sheriffe, had been twice married. By her first husband (who was living at the date of the will, but died in the testator's lifetime) she had issue two daughters and two sons; by her second husband she had issue a son only. Her two daughters were still infants. In August, 1875, the elder of them, with her mother's consent, had married Henry Walter Musgrove Bonham, and on her marriage a settlement of her interest under the will was made with the approval of the court.

A petition was then presented by Mr. and Mrs. Bonham and the trustees of their marriage settlement, praying that the trustees of the will might be directed to pay and transfer to the trustee of Mrs. Bonham's marriage settlement one moiety of the testator's residuary personal estate, after providing for payment of the annuities given by the will and certain other charges thereon.

The petition came on to be heard before the Master of the Rolls on the 27th of March, 1876.

Herbert Lake, for the petitioners: The class of children to take is ascertained when the first member of it attains a vested interest: *Hawkins on Wills* (1); *Jarman on Wills* (2). Mrs. Bonham attained a vested interest on marrying with her mother's consent: *Roper on Legacies* (3).

Ingle Joyce, for the respondents.

JESSEL, M.R.: In my opinion both questions raised by the petition may be fairly considered settled, though there appears to be no case in point as regards the first of them.

The gift is this. [His Lordship read it and continued:] It is a gift after a life interest to the female children of the testator's sister on attaining twenty-one, or marrying before twenty-one with the consent of their parents.

755] *I think it plain that marriage with the consent of the parents is a condition precedent; it is part of the description of the event in which a child is to take.

Now, at the death of the tenant for life, there were two children who could take. Both were infants and unmarried; and their father was dead. Subsequently one of them, being still an infant, married. She could not marry with the consent of her parents, in the plural, her father being dead. The first point to be considered is, whether she has attained a vested interest. She has not attained twenty-one, nor married with the consent of her parents, one being dead. If that be a condition precedent, the rule is that where a condition precedent annexed to a legacy becomes impossible by the act of God, the legatee takes

(1) Page 76.

(2) 3d ed., vol. ii, p. 146.

(3) 4th ed., p. 802.

nothing. It is otherwise if the condition is a condition subsequent; there the legatee takes absolutely, because there is nothing to take the legacy away from him. The question then is, whether the consent of one parent will do.

There are two cases which appear to me to decide the point. The first is that of *Knight v. Cameron* (*). There the legacy was to be paid to the legatee as soon as she attained the age of twenty-one or upon her marriage with the consent of the executors. There were two executors whose consent was required to the marriage, and one of them died before the legatee married. It was admitted on all hands that the latter branch of the condition had become impossible. It was not even suggested that it was a case in which the office of executor would survive; and that argument would not apply to a case where (as in the present) the consent of parents was required. It was held that the consent of one executor would not do, and that the gift being to the young lady at twenty-one or on marriage with the consent of two executors, she must wait till she attained twenty-one.

That case having been so decided, I next come to *Collett v. Collett* (*), where Lord Romilly held a condition as to marriage with consent to be a condition subsequent. He says: "I think it clear beyond controversy that this was a legacy-vested in Mrs. Lloyd immediately on the death of her father, liable to be divested *in case she died under twenty-one without having been married with the consent of her mother." Then he points out that this circumstance distinguished the case from *Knight v. Cameron* (*), in which there was not a vested legacy, and there was an insuperable direction that the condition must be performed to qualify the person to become entitled to the legacy.

With these two authorities before me, I think that, the condition being a condition precedent, and not having been performed, the petitioners are not entitled to a transfer of the fund.

The next question is, can anybody else become entitled to a share of the fund?

At the death of the tenant for life there was nobody within the description of the persons to take. It has been settled as a rule of convenience, in cases of this sort, that where the first person becomes entitled, you stop the increase of the class; otherwise the party who had become entitled would not be able to get his share; therefore you ascertain at that moment the least share which a person be-

(*) 14 Ves., 389.

(*) 35 Beav., 312.

coming entitled can take. That being so, I think that where one member of the class becomes entitled, no child who afterwards comes into existence can take a share. The rule is, that the period of distribution depends on the time when the first member of the class becomes entitled.

From this decision Mr. and Mrs. Bonham appealed, and the appeal came on to be heard on the 7th of April, 1876.

Cookson, Q.C., and *H. Lake*, for the appellants: We submit that the condition has been sufficiently complied with. The cases on consent to marriage proceed on this principle, that substantial compliance with the condition is enough. No case closely resembles the present in its circumstances, but the principle of the authorities justifies the court in reading the condition here as meaning "with the consent of the person or persons for the time being filling the parental office." The point did not arise in *Knight v. Cameron*. The real consent required is that of the sister, not of her husband. It would be too absurd to hold that the children of a second marriage could marry, but not 757] those *of the first marriage. The text writers all agree that in such a case the consent of the surviving parent would be sufficient: *Rop. Leg.* (1); *Williams on Executors* (2); *Story, Eq. Jur.* (3); *Swinburne* (4). The cases of *Farmer v. Compton* (5), *Mercer v. Hall* (6), *Clark v. Lucy* (7), show that where a condition becomes impossible it must be performed as well as it can. In *Worthington v. Evans* (8) "trustees" was read "trustee," so here "parents" must be read "parent." *Graydon v. Hicks* (9), *Co. Litt.* (10), are authorities on the subject.

Ingle Joyce, for the trustees.

Fischer, Q.C., and *R. Lake*, for the executors: This question must be raised, as Mrs. Bonham may die before she attains the age of twenty-one years. The language of the will is too strong to be got over, however inconvenient it may be. The testator must have known that his own sister's husband was dead, and if he did not alter his will, that shows that he meant it to be as we find it. In other parts of the will he speaks of "trustees or trustee," showing that he understood the difference. This is clearly a condition precedent, and the petitioner is not within the terms: *Hemmings v. Munkley* (11). Where the act of God

(1) 4th ed., p. 302.

(2) 7th ed., p. 1278.

(3) § 291.

(4) 7th ed., p. 416.

(5) Rep. in Ch., 1.

(6) 4 Bro. C. C., 326.

(7) 5 Vin. Abr., 87.

(8) 1 S. & S., 165.

(9) 2 Atk., 16.

(10) Page 112 a, n.

(11) 1 Bro. C. C., 304.

renders the performance of a condition impossible, the legacy fails, and the fact that the intended legatee has done all that he can is immaterial: *Falkland v. Bertie* ('); *Clark v. Parker* ('); *Boyce v. Boyce* ('); *Priestley v. Holgate* ('). *Green v. Green* (') is a strong decision, and cannot be reconciled with *Sugden on Powers* ('). In some cases a condition precedent which cannot be performed prevents a legacy from vesting: *Swinburne* ('); *Sykes v. Sheard* ('). The court cannot strain the words of the will to *mean what [758 they do not say. In *Collett v. Collett* (') the condition was subsequent.

Cookson, in reply.

April 7. JAMES, L.J., after stating the facts of the case: The law upon the subject is expressed in Mr. Roper's book on Legacies, or rather in Mr. White's original edition of Roper which was published in 1828. The previous edition of Mr. Roper himself, who was dead before this time, was in 1806, but it appears from the preface to the edition of 1828, that the chapter from which I am about to read was written by Mr. Roper himself, who must have spent a considerable portion of his life in getting up the subject of the Law of Legacies. He states it thus⁽¹⁰⁾: "There is, however, a peculiarity belonging to those conditions when the legacies are the subjects, which makes the rules of the common law inapplicable to them in every instance. This anomaly is produced from the adoption of the civil law in the construction of personal bequests to a certain extent, according to which, where the condition is precedent, it is considered to be performed within the meaning of the testator if executed *cy-près* when the whole cannot be literally fulfilled from unavoidable circumstances. The principle is the presumption of the testator not requiring the performance of impossibilities, and that his intention will be substantially carried into effect by permitting it to be executed as far as it can be done." And after some further general observations, he proceeds⁽¹¹⁾: "It follows from these observations that if a precedent condition require the consent of three trustees to the marriage of the legatee and one of them die, the approbation of the survivors previously to the marriage will be a sufficient compliance with the condition.

(1) 2 Vern., 333.

(2) 19 Ves., 1.

(3) 16 Sim., 476.

(4) 3 K. & J., 286.

(5) 2 J. & Lat., 529.

(6) 8th ed., p. 252.

(7) 7th ed., p. 401.

(8) 33 L. J. (Ch.), 181.

(9) 35 Beav., 812.

(10) 3d ed., p. 690.

(11) 3d ed., p. 691; 4th ed., p. 802.

For although the testator must have supposed that all his trustees would be living at the time of the legatee's marriage, or he would not have required their joint consent, yet doubtless he could not mean that by the accident of the death of one of them his bounty, or it may be his obligation 759] as a parent, should be *disappointed. It may be reasonably presumed that if the possibility of one of the trustees dying before it was necessary to consult him on the marriage had occurred to the testator, he would have expressly empowered the survivors to consent or disapprove of it. And since a prudent connection was the essence of the condition, and the object was attainable in securing it by the previous consent of the two trustees, the case seems to fall under the exception in the civil law to a strict performance of the condition, namely, when a testator appears to have more regard to the end than to the means prescribed for its attainment."

Mr. Justice Vaughan Williams, in his book on Executors, says this⁽¹⁾: "Next, concerning the performance of conditions in restraint of marriage. In the instances of conditions requiring marriage with consent of executors or trustees, it has been decided that such consent must be obtained before or at the marriage; for a subsequent approbation by the executors, &c., will not be a performance of the condition. Again, the consent of all the executors or trustees must be obtained, though, where one of them is dead, if the condition is precedent, it should seem that the consent of all the survivors is sufficient."

Mr. Justice Story puts it somewhat differently. Mr. Justice Story says⁽²⁾: "Where a literal compliance with the condition becomes impossible from unavoidable circumstances and without any default of the party, it is sufficient that it is complied with as nearly as it practically can be, or (as it is technically called) *cy-près*. - This modification is derived from the civil law, and stands upon the presumption that the donor could not intend to require impossibilities, but only a substantial compliance with his directions as far as they should admit of being fairly carried into execution. It is upon this ground that courts of equity constantly hold in cases of personal legacies that a substantial compliance with the condition satisfies it, although not literally fulfilled. Thus if a legacy upon a condition precedent should require the consent of three persons to a marriage, and one or more of them should die, the consent of the survivor or survivors would be deemed a sufficient compliance with the

⁽¹⁾ Wms. Exrs., 1278, 7th ed.

⁽²⁾ Story, Eq. Jur., § 291.

condition, and *à fortiori* this doctrine would be applied to conditions subsequent."

*Therefore, at least from the year 1828 down to the [760 present time, wherever the English language is spoken, wherever the English law prevails, and the English legal literature has been studied, it has been taught and accepted as the unquestioned doctrine of this court that the death of one of two persons whose consent is required does not destroy the gift, and that the consent of the survivor is sufficient. Lord St. Leonards, in the case of *Green v. Green* (*), has carried it even further, because dealing with a question as to land, which is supposed to be not subject to the civil law, on which these cases to some extent proceeded, he has decided that where a man had the power of jointuring any wife he should marry with the consent of A. B., the death of A. B. did not prevent him from jointuring a wife with whom he afterwards intermarried.

On the other hand, it is said, and it seems to have been thought by the Master of the Rolls, in dealing with this petition, that the two authorities to which he referred were decided the other way. One was the case of *Knight v. Cameron* (*), decided in 1807 by Sir W. Grant, but in that case the point was not only not decided, but could not have been decided. The consent required was of two executors, one of whom was dead, and the lady married without the consent of the other. All that the Master of the Rolls decided in that case was that she had not married with consent; there was no decision, and there was no dictum to the effect that marriage with the consent of the survivor would not have been a sufficient compliance with the condition.

The other case is *Collett v. Collett* (*), before the late Master of the Rolls; but when that comes to be considered, so far from being an authority the other way, or recognizing, as was supposed, *Knight v. Cameron* as being an authority the other way, the decision is really, as far as it goes, a strong authority in favor of the proposition contended for by the petitioner in this case. For there a testator gave a share of his residuary real and personal estate to his daughter, to be paid at the age of twenty-one years, or on her day of marriage, provided it should take place with the consent of his widow; the widow died; the daughter *married [761 under age, consequently without the consent of the widow, and the Master of the Rolls ordered the money to be paid out to the daughter on her marriage, no doubt treating it as

(*) 2 J. & Lat., 529.

(*) 14 Ves., 389.

(*) 35 Beav., 312.

a condition subsequent, and he uses this language⁽¹⁾: "I think that this is the true and proper conclusion to be drawn from the cases which decide that when the performance of the condition *in toto* has not taken place because the performance of a portion of the condition has become impossible through no act or default of the person who had to perform it, the performance of that portion of the condition will be dispensed with. Here, it is reasonably certain"—which is singularly like this case—"that the mother, if she had lived, would have given her consent to this marriage; one eligible in all respects, approved of by the friends and guardian of the lady herself, and sanctioned by the court. She has, therefore, performed the condition as far as it was possible for her to do so, but the consent of the deceased mother of course could not be procured."

This being the state of the law of the court and of the authorities, I think we are well warranted in putting a reasonable construction upon this will and in supposing that the testator was a man of ordinary common sense, and that he meant not to prevent the young lady from marrying under the age of twenty-one years, in the event of the death of one of the parents, but that the marriage should be substantially with proper parental consent, and that we are authorized in saying that it must be implied that the marriage was to be with the consent of the parents or parent, if any. *Qui hæret in literâ hæret in cortice*. And there probably never was a stronger illustration of how impossible it would be, consistently with sense, to give a literal construction to a bequest than is exhibited in this particular bequest. There is not a line in this gift which can be literally construed and made sensible, for there is no gift, except a gift by division between children; therefore there would be no gift to one child only if there had been only one daughter. Then, again, the only direction is for a division on their attaining the age of twenty-one years or marrying. Beyond all question "division" does not mean "division," and "their" does not mean "their," because, unless you assume the event of 762] a *daughter attaining the age of twenty-one, and the other daughter marrying at that same time, there never would be any division at all, and the share of the daughter, so far as it was then ascertained, would be paid to her, not on "their" attaining the age of twenty-one or "their" marrying with consent, but on "her" attaining the age of twenty-one or "her" marrying with consent. Another absurdity mentioned in the argument would arise on this

(1) 35 Beav., 312.

will, that assuming the case to be, as it might very well happen, that the lady might marry more than once, and the lady so marrying might have some other daughters, then there would be this absurdity, that the daughters of the first marriage never could marry with consent, though the daughters of the second marriage could.

I do not base my opinion upon those reasons, but I refer to them as illustrating the propriety of the doctrine, that we must treat the thing reasonably, and say that the consent must be the consent of the parents or parent, if any. Therefore, I am of opinion that the petitioners are entitled to have what they have asked for.

MELLISH, L.J.: I am of the same opinion.

BAGGALLAY, J.A.: I do not think it necessary to add anything.

Solicitors: *Lakes, Beaumont and Lake; Sladen & Macenzie.*

[2 Chancery Division, 788.]

C.A., April 26, 1876.

**In re DEIGHTON'S SETTLED ESTATES.*

[783

Will—Vesting—Period for ascertaining Class.

A testator directed his trustees to pay the income of his real and residuary personal estate to his wife for life, and on her death to apply the income in the maintenance of his children then living and the issue of his children then deceased (such issue taking the share which their parents would have taken if living) until his youngest surviving child attained twenty-one, and when such child attained twenty-one, to sell the real estate and hold the proceeds and the personal estate in trust for his children then living and the issue then living of his child or children dying before that period. The youngest child attained twenty-one twelve years before the widow's death:

Held (affirming the decision of the Master of the Rolls), that the class was not to be ascertained before the death of the widow, and that the legal personal representatives of a child who had died without issue in her lifetime took nothing.

Where the effect of postponing the vesting of the shares of children to the period of division would be to leave the family of a child dying before that period without provision, the court leans strongly in favor of early vesting; but where a testator provides for all his issue living at the period of division, his words will not be strained in order to make the shares vest at an earlier period.

THIS was an appeal from an order of the Master of the Rolls.

W. S. Deighton died in October, 1841, leaving a will by which *he gave his real and residuary personal estate [784 to trustees upon trust to convert so much as did not consist of ready money or of freehold or leasehold estate, and, after payment of debts and a legacy, to invest the residue of the proceeds in consols; and he directed that all the said trust

estates and premises should form an aggregate fund, and be held upon trust to pay the income to his wife during her life, if she so long continued his widow, but if she married again, then to pay her £50 a year during the remainder of her life; "and on my said wife's death, or marriage, to apply such income, or the residue thereof, in or towards the maintenance, education, bringing up, and supporting of such child or children of mine then living, and of the issue of my child or children then deceased (such issue taking the share in such income only as the parent or parents, if living, would have taken) until my youngest surviving child shall have attained the age of twenty-one years. And I direct my trustees, when my youngest surviving child shall have attained the age of twenty-one years, to sell all my said freehold and leasehold estates, and to stand possessed of the money arising therefrom and the residue of the trust premises in trust for my child or children then living, and the issue then living of my child or children dying before that period, such objects to take as tenants in common *per stirpes*, the shares of the children to be paid immediately, the shares of the other issue, being males, at the age of twenty-one years, or, being females, at that age or marriage."

The testator left a wife and nine children. The youngest child attained twenty-one in February, 1862. The widow died in December, 1874. In the meantime several of the children had died, some leaving issue and some without issue.

The opinions of two eminent counsel were taken, one in 1857 and the other in 1870; and they both advised that, without doubt, the class of takers was to be ascertained when the youngest child attained twenty-one, and that their interests then vested. A third counsel, in 1872, further advised that the property had become saleable when the youngest child attained twenty-one. The trustees, after the widow's death, paid away some parts of the residuary personal estate in accordance with these opinions.

The question now arose, who were entitled to the proceeds 785] of *part of the estate which had been sold during the widow's life under the Settled Estates Act, and the purchase-money paid into court. The Master of the Rolls decided that the class was to be ascertained at the widow's death, thus excluding the personal representatives of children who had died in her lifetime.

J. J. Wilks, who was entitled to the interest, if any, of one of these deceased children, appealed.

Bristowe, Q.C., and Freeling, for the appellant.

Waller, Q.C., and W. Barber, and Fischer, Q.C., and Everitt, for the respondents, were not called upon.

JAMES, L.J.: I think the construction of this will reasonably, clear. Putting aside the contingency of the wife's marrying again, which has not happened, the scheme of the will is this: The testator gives his property to his wife for life, and after her death he directs the income to be applied for the maintenance of his children, and the issue of deceased children, until the youngest child attains twenty-one, proceeding on the assumption that his children will not all have attained twenty-one at his wife's death. When the youngest child attains twenty-one he directs the property to be sold. He cannot have intended this sale to take place during the life of his wife. He never meant to take away the income in specie which he had given to her. In saying that the sale is to take place when the youngest child attains twenty-one, he means that the sale is to take place when both events have happened—the death of the wife, and the youngest child's attaining twenty-one. In directing the proceeds to be held in trust for a class of persons "then" living, he means living at the time at which, according to the will, the sale was to take place. The court leans strongly in favor of the early vesting of interests in cases where the effect of holding the share of a child of the testator to be contingent on his living to a future period would be that, if he died before that period leaving a family, his children would take no benefit under the will; but there is no reason for departing from the fair meaning of the words of a testator in order to vest the *shares of his children, when [786 he has made a provision for all his descendants living when the fund becomes divisible.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Fielder & Sumner; Heather & Son.*

[2 Chancery Division, 797.]

C.A., April 27, 1876.

**Ex parte* ELLIS. *In re* ELLIS.

[797

Bankruptcy—Adjudication—Appeal—Locus standi of Appellant—Holder of Bill of Sale alleged to be invalid—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 71—Assignment of all Debtor's Property.

An adjudication of bankruptcy was made, founded upon the execution by the debtor of a bill of sale which was held to be an act of bankruptcy:

Held (affirming the decision of Bacon, C.J.), that the holder of the bill of sale was entitled to appeal from the adjudication.

Statement of the principles which guide the court in determining whether an assignment of all a debtor's property is an act of bankruptcy.

THIS was an appeal from an order of the Chief Judge in Bankruptcy annulling the bankruptcy of Robert Ellis, a farmer in Cambridgeshire⁽¹⁾.

The petition for adjudication was presented on the 20th of November, 1875, by E. E. Ellis, the father of the bankrupt, a creditor to the amount of £910. The act of bankruptcy alleged was a bill of sale dated the 22d of July, 1875, whereby the bankrupt assigned all his property, both present and future, to Francis Thoday, to secure an antecedent debt of £1,840, and a present advance of £105, and also any further advance not exceeding £2,200. The Registrar of the Cambridge County Court having adjudicated Ellis bankrupt, and having afterwards refused to annul the adjudication, Thoday appealed to the Chief Judge, who reversed the decision of the Registrar, and annulled the adjudication. The petitioning creditor appealed.

Winslow, Q.C., and *Pope*, for the appellant, renewed the objection taken before the Chief Judge, that Thoday had no *locus standi* to appeal against the decision of the Registrar. His right to enforce his bill of sale was not affected by the fact that it had been treated by the Court of Bankruptcy as an act of bankruptcy. If the trustee attempted to set it aside, he would have an opportunity of trying the question. He was not, therefore, "aggrieved" within the meaning of the 71st section of the Bankruptcy Act, 1869.

They referred to *Revell v. Blake*⁽²⁾.

798] **De Gez*, Q.C., and *Cockerell*, for Thoday, were not called on.

JAMES, L.J.: I think there is no doubt that the appellant is entitled to appeal. Though he may not be bound by the order of adjudication, still it would so embarrass him that he may properly be said to be aggrieved by it. The validity of the bill of sale is a simple question, which may as well be tried at once.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Winslow, Q.C., and *Pope*, then proceeded to argue that the true result of the evidence was that the fresh advances were not made for the purpose of enabling the bankrupt to carry on his business, but only for better securing the antecedent debt due to Thoday. From the time of the execution of the deed the whole property had been under the control of Thoday. The case was therefore distinguishable from *Ex parte Winder*⁽³⁾ and *Ex parte King*⁽⁴⁾.

⁽¹⁾ *Ex part Thoday*, *In re Ellis*, ante, p. 229.

⁽²⁾ 1 Ch. D., 290.

⁽³⁾ *Ante*, p. 256.

⁽⁴⁾ Law Rep., 7 C. P., 300.

[MELLISH, L.J.: The result of the authorities is, that where a debtor assigns his whole property as a security for a past debt only, it is an act of bankruptcy, whatever the motives of the parties may have been. If there is also a further advance, it is not a question whether the further advance is great or small, but whether there was a *bona fide* intention of carrying on the business.]

De Gez, Q.C., and *Cockerell* for Thoday, were not called on.

JAMES, L.J., said that it was clear from the evidence that the transaction was *bona fide*. It was the intention of both parties that the bankrupt should go on with his business, and that if he behaved well he should receive further help. The decision of the Chief Judge must be affirmed, and the appeal dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitor for appellant: *W. Marshall*, Ely.

Solicitors for respondent: *Tarrant & Mackrell*, agents for H. J. Whitehead, Cambridge.

[2 Chancery Division, 812.]

V.C.B., Dec. 7, 8, 10, 11, 14, 15, 17, 18, 21, 1875; Jan. 12, 13, 14, 15, 18, 19, 20, 21;
Feb. 1: C.A., May 8, 9, 10, 11, 15, 16, 1876.

*PATTERSON V. GASLIGHT AND COKE COMPANY. [812

[1878 P. 62.]

Patent—Infringement—Subject of Patent—Prior User—Anticipation—Disqualification of Plaintiff from being a Patentee.

Under an act of Parliament three referees were appointed by the Board of Trade to inspect the gas works of the metropolis, to report upon the impurities in the gas, and to fix a maximum of impurities to be allowed; and the gas companies were bound to give them every facility in the discharge of their duties.

One of the referees took out a patent for improvements in the purification of gas, claiming (*inter alia*) a method of employing lime purifiers, whereby the contents of the purifiers might be converted into sulphide of calcium, for the purpose of purifying the gas from certain compounds of sulphur with which sulphide of calcium combines.

Before the patent was taken out, the defendant company had been in the habit of using lime purifiers, by which sulphide of calcium had been produced, but they had not succeeded in attaining the desired purity on account of their failing to extract from the gas the whole of the carbonic acid contained in it, which impeded the operation of the sulphide of calcium in the purifiers. The plaintiff's invention mainly consisted in keeping a fresher supply of lime in the first series of purifiers, so as completely to eliminate the carbonic acid from the gas before it was passed on to the subsequent purifiers, in which the sulphide of calcium was produced. The principle of this improvement was indicated in the last report of the referees, but the report was not published till after the date of the patent:

Held (reversing the decision of Bacon, V.C.), that the plaintiff's invention only

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Patterson v. Gaslight and Coke Co.

C.A.

813] amounted to an instruction for the more efficient working of a *known process, and was not a proper subject for a patent, and the plaintiff's bill was dismissed.

Whether it is competent for a member of an official commission to take out a patent for the results of his official investigation, *quære*.

THIS was a suit instituted by Robert Hogarth Patterson against the Gaslight and Coke Company, commonly called the Chartered Gas Company, and J. O. Phillips, their secretary, for the purpose of restraining them from infringing the plaintiff's patent for the purification of gas.

The defendant gas company have extensive works at Beckton, Bow Common, Blackfriars, and elsewhere.

Coal gas before purification contains various impurities, particularly tar, water, ammonia, carbonic acid, and also sulphuretted hydrogen, and other compounds of sulphur. Not much difficulty has been experienced in removing the tar, water, ammonia, and sulphuretted hydrogen, but it has been found more difficult to remove the other compounds of sulphur. The defendants had paid great attention to the subject, and had made extensive experiments, particularly at Beckton and Bow Common, but were unable to keep down the sulphur impurities within the requirements of the Board of Trade.

The crude gas was first passed through vessels, called washers and scrubbers, to remove the tar, water, and ammonia, and (previously to 1850) was then passed into purifiers containing lime to remove the sulphuretted hydrogen. The sulphuretted hydrogen combining with the lime in the purifiers produced sulphide of calcium, which is the only known agent for absorbing the other forms of sulphur remaining in the gas. The purifiers were worked in sets of four, three being at work, and the fourth being charged with lime and ready to be brought into action when required. The first in the series was thrown out of action when the last or last but one showed at the outlet any trace of sulphuretted hydrogen; the fourth purifier, charged with fresh lime, was then put on last in the series.

In 1850 oxide of iron began to be used instead of lime for the purpose of removing the sulphuretted hydrogen. Oxide of iron has no effect on the other compounds of sulphur; and soon after the introduction of oxide of iron as a purifying agent, complaints *began to be made that a large portion of these compounds was to be found in the gas consumed in the city of London.

* The defendants, in order to remove these compounds, made use of lime in addition to oxide of iron.

The plaintiff claimed to have discovered that none of these

processes employed by the defendants entirely removed the carbonic acid from the gas, and that that acid combined with the sulphide of calcium in the purifiers, turning it into carbonate of lime, and thus preventing it from acting properly on the sulphur compounds. The plaintiff alleged that no means were known before the publication of his patent for overcoming this difficulty.

The plaintiff was one of the three gas referees appointed by the Board of Trade under the City of London Gas Act, 1868, 31 & 32 Vict. c. cxxv, whose duties are thus defined:

By sect. 34 it is enacted that the referees shall, with all practicable speed after their appointment, and from time to time thereafter, inspect the works of the companies, and investigate the processes of manufacture carried on therein, with the view of ascertaining the means adopted therein for purifying gas and for preventing nuisance, and may from time to time apply all such tests as they think expedient at the works of the companies or elsewhere for ascertaining the amount of sulphur and of ammonia and of compounds thereof, or other impurity, with which gas supplied by the companies is charged. By sect. 35 the companies are to give to the referees access to their works, and to afford them all facilities in the execution of their duty. By sect. 36 the referees are from time to time to ascertain with what degree of purity each company can reasonably be required to make and supply gas continuously without occasioning a nuisance to the neighborhood in which the works are situate, and are thereupon to prescribe and certify the maximum amount of impurity in each form with which gas supplied by the company shall be allowed to be charged, and the time from which the allowance thereof shall be enforced as against each company, regard being had to the necessity for any alteration of works by a company consequent on such certificate.

On the 31st of January, 1872, the referees signed a report, *entitled "Report on Sulphur Purification at the [815 Beckton Gasworks, by the Gas Referees."

This report stated fully the process used at those works and the results; and also discussed the whole subject of gas purification. Under the head of "Remedies" the referees said (*inter alia*): "The prime object to be sought is to utilize and perfect the existing processes of purification; for if these can be made to yield satisfactory results, the interests of the public require that this should be accomplished in preference to the introduction of other processes which would increase the cost of gas manufacture.

"The referees feel confident that such a result is attain-

able. From experiments which they have made they can state that lime in the form of sulphide of calcium (i.e. saturated with sulphuretted hydrogen) is a perfectly adequate purifying agent for sulphur. In their laboratory experiments they are able in this way to wholly remove the sulphur (about 26 grains per 100 feet) from the gas supplied to their office. So great a result cannot, of course, be expected in gasworks. . . . Nevertheless, making due allowance for the difference between laboratory experiments and purification on a manufacturing scale, the referees feel assured that useful results would be obtained from the lime process of purification, if carbonic acid were excluded from the purifiers; and also that the result will be adequate to the requirements of the public, if the carbonic acid which enters the purifiers be kept down to the lowest point actually attainable in gasworks. The problem to be solved is how to take out all the carbonic acid from the gas without simultaneously taking out all the sulphuretted hydrogen, which latter element is needed to convert the contents of the purifiers into sulphide of calcium. And the essence of the difficulty consists in the fact that carbonic acid exists in the gas in very much larger proportion than sulphuretted hydrogen; while there is no chemical substance which absorbs carbonic acid, without also absorbing sulphuretted hydrogen."

The referees then suggest improvements in the structure of the scrubbers, and with respect to the purifiers they say, "By far the most important point, where (as at Beckton) lime purifiers are used, is to reduce as much as possible the amount of carbonic acid in the gas in the anterior process of 816] purification. . . It appears impracticable *at present to entirely exclude carbonic acid from the processes; but the referees are of opinion that the detrimental action of this element might be lessened by adopting a new system in working the purifiers, namely, by keeping (say) the two first lime purifiers in each house in action, not merely until they become "foul," but until the carbonic acid has expelled the sulphuretted hydrogen and taken its place. By this method the largest possible amount of carbonic acid will be absorbed from the gas by the first purifiers of the series; while the sulphuretted hydrogen is driven forward, converting the contents of the subsequent purifiers into sulphide of calcium."

This report was not received at the Board of Trade till the 27th of March, 1872, and was soon afterwards communicated to the defendants.

In the meantime the plaintiff, on the 9th of March, 1872, applied for a patent, which was dated the 9th of March, 1872, for "Improvements in the Purification of Coal Gas."

With respect to the purification of the gas from carbonic acid gas, the plaintiff, after referring to the chemical fact that lime had a greater affinity for carbonic acid than for sulphuretted hydrogen, stated his method of applying that principle to the purification of gas as follows: "One process of applying the above described principle is by passing the gas through the first lime purifier or purifiers of the series for such time that the carbonic acid from its greater affinity for lime shall have expelled sulphuretted hydrogen from the said purifier or purifiers, taking its place and driving it (namely, the sulphuretted hydrogen) forward into the succeeding purifiers. By this means the carbonic acid can be wholly eliminated from the gas by the first purifier or purifiers, while sulphuretted hydrogen being driven forward converts the contents of the succeeding purifier or purifiers into sulphide of calcium, which is a highly efficient material for purifying the gas from sulphur in other forms than sulphuretted hydrogen. Thereupon these latter mentioned purifiers, now containing sulphides of calcium, may be used first in the series and the gas passed through them into subsequent purifiers containing fresh lime, whereby the contents of these subsequent purifiers, or of any one of them, can be converted in turn into sulphides of calcium. Or the first purifier or purifiers *of the series may be constantly [817 employed chiefly for the purpose of eliminating the carbonic acid from the gas, while sulphur in all forms is eliminated from the gas in the succeeding purifiers."

The plaintiff claimed as his invention :—

"First: The employment of sulphides of calcium in separate purifiers, as a means of purifying coal gas from sulphur existing in other forms than in that of sulphuretted hydrogen.

"Secondly: A method or system of employing lime purifiers in the manner hereinbefore described, whereby the contents of all the said purifiers, or of any required number of them, can be converted into sulphides of calcium, and also (if required) be maintained in that condition.

"Thirdly: The employment of a solution of caustic soda, or of potash, or of ammonia, used in washers or scrubbers in the manner hereinbefore described, in order to eliminate carbonic acid from coal gas, and in such a manner as to convert the lime in purifiers, or the soda solution contained in any required number of the said washers or scrubbers, into

sulphides of calcium and sulphides of sodium respectively, and also, if required, to maintain them in that condition.

"Fourthly: The employment of the soda washers or scrubbers, after the gas has been purified from carbonic acid and sulphuretted hydrogen, as a means of purifying the gas from sulphur existing in other forms than that of sulphuretted hydrogen.

"Fifthly: The employment of sulphur in a fine state of division, in conjunction with an inert substance suitable to form a porous substance through which the gas may pass freely, or in combination with lime or with soda (or with lime and soda together), in solution or otherwise, in order to effect the purification of coal gas from sulphur existing therein in other forms than that of sulphuretted hydrogen."

The plaintiff accused the defendants of having adopted all or some of his patented improvements, and eventually filed the present bill to restrain them from infringing his patent.

The defendants contended that the claims made by the plaintiff were too general; that as to the first, third, fourth, and fifth claims, there was no novelty; and as to the third, 818] fourth, and fifth, that the *alleged inventions were of no practical value; that the alleged inventions, or some of them, had been anticipated by a patent taken out by W. Mann in December, 1871; and that the alleged improvement mentioned in the second claim was not the proper subject for a patent, being neither the discovery of a new principle nor the invention of a new process, but only a practical direction for working a well-known process. The defendants also insisted that the plaintiff had derived his knowledge of the method which he pretended to have invented from the opportunities afforded him, in his official position, of seeing the processes employed by the defendant company, and from information supplied to him by them; and they submitted that it was not competent for the plaintiff to make use of the knowledge acquired by him as a public officer in the discharge of his duties, for the purpose of taking out a patent.

Both parties went into evidence as to the novelty and utility of the plaintiff's improvements, and as to their anticipation by the defendants in their own works; the result of which evidence is stated in the judgment of the Court of Appeal.

It appeared that the defendants had consulted Dr. Odling and Dr. Letheby, and obtained from them reports, of which Dr. Odling's recommended a process similar to that de-

scribed in the plaintiff's patent. Dr. Odling's report was dated the 28th of March, 1872, subsequent to the plaintiff's patent.

The case came on to be heard before Vice-Chancellor Bacon on the 7th of December, 1875, and the plaintiff and several witnesses were examined in court.

Kay, Q.C., *Fry*, Q.C., *Aston*, Q.C., and *Tremlett*, appeared for the plaintiff.

Southgate, Q.C., Sir *H. James*, Q.C., *Davey*, Q.C., and *Stirling*, (*Hawkins*, Q.C., with them), for the defendants.

BACON, V.C., after stating the nature and object of the plaintiff's patent, and the various methods employed by the defendants in their works to remove the sulphur impurities in the gas, and the suggestions made by Dr. Letheby and Dr. Odling for improvements in the process, continued:

In Dr. Odling's suggestion the first and most essential principle *recommended is the "completely decar- [819 bonating the gas by means of lime frequently renewed, and then transmitting the completely decarbonated gas through other lime, but very seldom renewed."

It has been admitted, and is, in my opinion, clearly established by the evidence, that the principle of Dr. Odling's recommendation is identical with that of the invention claimed by the plaintiff and expressed in his specification. But the manner of applying that principle is nowhere mentioned by Dr. Odling. He had examined, and was well acquainted with, the apparatus and mode of working employed by the defendants. It did not, perhaps, fall within his province to suggest any improvement in the mechanical contrivances by which the primary and essential condition which he prescribed, viz., the decarbonating the gas before its purification, should be fulfilled. At all events, he did not so suggest, but he says: "Of course if it could be contrived in any way to make the decarbonated gas remain in contact with the sulphide of calcium for a longer period, a better result might be anticipated."

And this very contrivance is described in the plaintiff's specification. By that contrivance the decarbonated gas remains in contact with the sulphide of calcium for a longer period, and that thereby a better result has been attained is not a matter in dispute. For, upon the pleadings, it is apparent, and it has been frequently admitted by the defendants' counsel in the course of the argument, that the process which is now employed and practised by the defendants in their manufacture of gas at Beckton is identical with that which is claimed by the plaintiff to be his inven-

tion. The defendants deny, however, the novelty of the alleged invention, and they dispute the validity of the patent upon several grounds—each of which they say is enough, if established, to invalidate the patent. Each objection has been argued at great length, and with consummate ability, and each of them is entitled to separate and serious consideration.

Not the least important of them is the objection raised to the specification, which has been subjected, as it is right that it should be, to a most minute and searching criticism. It is undoubtedly the law, and it is also perfectly just and reasonable, that a man who has obtained a patent should be under the obligation of stating in clear and intelligible terms [820] the nature of the invention he claims, *and the means by which that invention is to be applied in practice. The construction of a specification, like the construction of all written instruments, is in all cases for the court in which the question arises, and must be dealt with strictly, it is true, but also with a fair regard to the subject, and to the terms which are employed. Now the meaning of the plaintiff, whatever terms he may have employed, I take to be this: He says to all the world, but he must be taken at the same time to address especially the persons engaged in and acquainted with the manufacture of gas, "I have found out a better method of purifying gas than has been hitherto known and practised. The existence of impurities is notorious. The names by which they are called are known. The existing process of manufacture is well known, and the failures to remove the impurities are known and acknowledged by you. I am the first person who has found out that there is a principle by which that object for which you have been striving for years, and in vain, can be attained; and I have discovered, and will tell you, by what process that principle can be applied." Those words are not in the specification, but having regard to the subject to which they are applied, their meaning must, in all fairness, be ascribed to it. He does say in very words, "I have been the first to see the importance of and to have practically carried into effect the principle of excluding carbonic acid from lime purifiers, or from any required number of these, as a means of obtaining steady and perfect results in the purification of gas from sulphur." This being the object of the invention, he says it relates to the purification of coal gas from sulphur by means of sulphides of calcium (distinct from foul lime) employed in separate purifiers. That is the principle. He further says it relates to a principle and pro-

cess of working lime purifiers (things which are used in all gas manufactories), whereby the carbonic acid in the gas is eliminated by the action of the first purifier or purifiers in the series, in such manner that the lime in the subsequent purifiers is converted, either wholly or to any extent that may be desired, into sulphide of calcium. In subsequent parts of the specification he explains the manner in which he proposes to employ the processes. He points out the most economical manner of making the sulphide of calcium, and describes in detail what he calls the new principle and process of *employing lime purifiers. He describes [82] one process by which several purifiers may be employed in succession or rotation. "Or," he says, "the first purifier may be constantly employed." In the "claim" which concludes the specification, he says: "What I consider to be novel and original, and therefore claim, is, first, the employment of sulphides of calcium in separate purifiers as a means of purifying gas from sulphur in other forms than sulphuretted hydrogen; secondly, a method of employing lime purifiers in the manner hereinbefore described, whereby the contents of all the said purifiers, or of any required number of them, can be converted into sulphides of calcium, and also, if required, be maintained in that condition."

Now, upon this it has been argued for the defendants that under the first head he claims as a novelty the use of sulphide of calcium, whereas that substance and its purifying effects upon gas have been long known to chemists and to gas manufacturers, and that the process first described being bad, upon that ground the alternative process suggested by the plaintiff must be bad also, the law being, as it is truly said, that a patent granted for a claim which is bad in part must be held to be bad in the whole. But I do not think that the plaintiff has in any part of his specification claimed the use of sulphide of calcium as his invention, or that the reference to "the manner hereinbefore described" vitiates or affects the claim in which those words occur.

The objection of the defendants that the invention claimed by the plaintiff cannot be the subject of a patent does not appear to me to be well founded, for he does not claim the discovery of a principle only (which would not be sufficient), but of a principle combined with a process, easily applicable by any persons acquainted with the manufacture of gas, by which the principle may be exercised for the purpose of producing the result indicated. The other objections to the specification appear to me to be groundless, for I hold that

the construction of the instrument is reasonably clear—that there is no uncertainty or ambiguity in its expressions—that it does not raise any inconsistent claims—and that it is not open to the objection that, being bad in some part, it must be held to be bad altogether.

But then the defendants insist that there is no novelty in 822] the *invention claimed, and to this point a very large proportion of the evidence adduced by the defendants has been directed. They have called the three principal officers employed at the defendants' works at Beckton and at Bow, two very eminent professors of chemistry, and five other persons acquainted with the chemical properties of gas—with the manner in which it is manufactured—and the means by which impurities are removed from it. They all assert that there is no novelty in the plaintiff's invention, for that by the use of lime, by the production of sulphide of calcium, and by its effect on the sulphur impurities, they may be, and have, in fact, been removed. All of which is perfectly true, and if the plaintiff had denied this and had founded his claim upon such denial, the evidence I have alluded to might have been conclusive against the patent. But not only does the plaintiff not deny these facts, but his invention assumes and adopts them, and it is not satisfactory (although the practice is by no means new) to impute to the adversary something which he has neither said nor meant, and then to proceed by demolishing it to obtain an easy and certain victory. What the plaintiff says is, "Granting that all you say, you have known and done, you don't say that you knew the first essential process in removing sulphur compounds from gas was to eliminate carbonic acid by sulphide of calcium (not by 'foul lime'), and by means of separate purifiers." And no one of these witnesses says he did. And until Dr. Odling pointed it out as a discovery of his (which probably it was although made after the date of the patent), there is no trace that I can find in all the verbose and voluminous evidence which has been furnished by the defendants, that either the principle or the process described in the specification had been used or was known in the manner and for the purpose described in the specification. And I am compelled to observe on this part of the case that if what these witnesses say were adopted, it is impossible to account for the excessive amount of impurity which the tables I have referred to show to have existed in the gas before the date of the patent, or for the frequent confessions by the defendants' agents that they did not know how to reduce that impurity, although they

were earnestly endeavoring by experiments and otherwise; and although they had called in the advice of Dr. Letheby and Dr. Odling to assist them in *effecting that most [823 desirable object, Dr. Letheby's suggestions are wholly different from the plaintiff's invention. Dr. Odling's are identical with them; but until his letter of the 28th of March was communicated to the defendants, there is no ground that I can find on which it can be said that the principle and process then patented by the plaintiff were not novel. That they have proved to be useful is established by the fact that the defendants have adopted and used and are now employing it.

Another ground upon which the novelty of the patent was impeached was that a patent which had been taken out by Wm. Mann had anticipated the plaintiff's alleged invention. The provisional specification by Mann was filed on the 2d of December, 1871. [His Lordship then considered the terms of that patent, and continued:]

It would, however, be enough to say that the specification of Mann, anterior as it is to that of the plaintiff, cannot invalidate the plaintiff's patent, inasmuch as it does not disclose a practical mode of producing the effect which the plaintiff describes: *Betts v. Menzies* (¹). But besides this, it must be added that Mann's patent never has been brought into actual operation, but has been suffered to drop, and is no longer in existence.

The defendants insist, moreover, that the invention claimed by the plaintiff had been used by them before the date of the patent; and to this end a considerable portion of their evidence and the arguments founded upon it have been addressed. [His Lordship then referred to the experiments which had been made by Mr. Trewby, the manager of the defendants' works at Beckton, to eliminate the carbonic acid, and remarked that the experiments, whatever they were, had been unsuccessful. He then continued as follows:]

It may be that Mr. Trewby knew that the presence of carbonic acid was an obstacle—it may be that he was—indeed, it is clear that he was—making experiments to overcome it, and that he had partially succeeded; but even if it were assumed (which, as matter of fact, I cannot do) that he had conceived the same idea as the plaintiff, that would amount at the most to this, that of two men travelling on the same road, in search of the same *object, the one who [824 first attains it, who describes it in intelligible and accurate

(¹) 10 H. L. C., 117.

expressions, and who obtains a patent for the protection of what he has thus acquired, cannot be deprived of it because another would fain have reached the goal before him, but did not.

Then it has been said that the plaintiff's invention had been published by means of a letter which he wrote to Mr. Trewby before the date of his patent. The purport of the letter is to request Mr. Trewby to try certain experiments respecting carbonic acid. It was written at a time when the plaintiff says he had collected the materials for the specification which he shortly afterwards filed, and because he wished to have the experiment he suggested tried upon the large scale which the Beckton Works afforded. Without ascribing to this letter the character of a confidential communication, I think it was no publication, and Mr. Trewby, who did not return any answer to this letter, thought, and thinks so too; for he denies "emphatically" that he received from the plaintiff any information which guided him in the experiments which he made or in the discoveries he arrived at.

It has been suggested in the course of the argument that the patent is invalid with respect to the third, fourth, and fifth heads of the invention. But I think these objections cannot be said to have been fairly or sufficiently put in issue by the defendants, or that any evidence has been adduced upon which they can be sustained. All that the defendants say upon the subject in their answer is, that "they have never tried the processes purporting to be described in those three heads, and have no intention of doing so, but they believe there is no novelty in any of them; and that such processes are of no practical value whatever for the purification of gas from sulphur, or for any other purpose." In Mr. Evans's affidavit he says, "such processes were all well known to gas engineers who have used them in the purification of gas, but such processes have long since been abandoned by them." The statute 15 & 16 Vict. c. 83, s. 41, provides that in actions at law no evidence shall be admitted unless the objection shall have been distinctly raised, and the principle of that enactment has been recognized and acted upon in suits in equity: *Finnegan v. James* ('). The 825] plaintiff having stated in his specification that "he proposed to attain the same object (viz., the purification of gas from sulphur compounds) "by means of sulphur in a fine state of division used along with sawdust, or such like substance," says in his fifth head of claim that he claims

(') Law Rep., 19 Eq., 72.

"the employment of sulphur in a fine state of division with an inert substance." Upon this it has been argued that when oxide of iron had been employed to take out sulphuretted hydrogen, some portion of sulphur must in that process have been deposited on the iron, and that upon its being revived, the sulphur so deposited will form sulphur "in a fair state of division with an inert substance." I cannot, however, think that in any just mode of construing the specification, oxide of iron, which is a most active and efficient agent in taking out sulphuretted hydrogen from the whole volume of the gas to which it is exposed, can be said to mean one of those "inert substances like sawdust," which the plaintiff proposes to employ with sulphur in a fine state of division.

The only other objection to the plaintiff's suit is directed against him personally. The answer alleges that the plaintiff, "previously to his appointment as a gas referee, had no acquaintance with the modes and processes of manufacturing gas." That the defendants believe that the plaintiff derived his knowledge of the methods which he pretends to have invented from opportunities afforded to him in his official position of seeing the processes employed by the company, and from information directly supplied to him by persons employed by the company. And the defendants submit to the court whether it is competent for the plaintiff to make use of the knowledge acquired by him as a public officer in the discharge of his duties for the purpose of taking out a patent. This objection has been earnestly enforced in argument. I cannot, however, say that I think the plaintiff was disqualified, by reason of his employment, from availing himself of any discovery he may have made. His duties as a public officer are very clearly prescribed by the statute under which he was appointed. He appears to have discharged those duties in co-operation with the other referees efficiently, certainly without any censure or complaint that I have heard of. No doubt he could not have made the discovery he claims, unless he had obtained extensive and accurate knowledge of the manufacture and *purification of gas. How much of that knowledge [826 was derived from the information afforded to him by the company's officers, and how much of it was the result of his own inspection and observation, need not be inquired into, and cannot be ascertained. But whatever was the extent of such information, it does not seem to have been more than his powers under the statute would reasonably

entitle him to require, nor to have led to the discovery in any other manner than that the knowledge of known laws and principles must exist before the faculty of invention can have an object to which it may be applied.

I have not thought it necessary to go into the report of the referees, made on the 21st of March, 1872, to the Board of Trade, because I do not think that it affects the real question between the parties, and because I am unwilling to extend further the observations I have felt it right to make.

Many authorities have been referred to on both sides ; but as the law upon this subject is perfectly familiar and open to no doubt, it is needless to mention them. If the objections taken by the defendants were well founded, it is clear that the patent could not be sustained. On the other hand, those objections failing, the plaintiff's rights and his title to relief are established by numerous decisions.

I believe that I have now gone through at least the principal and the only important topics which have been discussed. I have attended to that discussion during the several days which it occupied, and I have since looked through the evidence and considered the arguments addressed to me. The task has been somewhat laborious, but having performed it as well as I am able, I come to the conclusion that the plaintiff is the inventor of a principle and process, by which the purification of gas from what are called the sulphur compounds may be effected to a greater extent than had ever been practised before the date of the letters patent ; that the defendants, who admit that they have adopted and now practise that invention, have been and are able to keep down the amount of impurities in the gas to an extent and degree very far superior to those which existed before the plaintiff's patent rights were created, and to exercise a much greater control over those impurities than they had been able to exercise previously. The defendants *having then practised the plaintiff's invention without his consent, I think he is entitled to the injunction prayed for by his bill, and is also entitled to be paid by the defendants such damage as he has sustained by their unlawful use of that which was his exclusive property. And for this purpose an inquiry must be directed to ascertain the amount of such damage.

The VICE-CHANCELLOR also gave the plaintiff his costs of the suit ; and, upon an application on behalf of the defendants, permitted the injunction to be suspended for three months, the defendants undertaking to abide by any order

the court might make as to damages payable by them in consequence of such suspension.

From this decision the defendants appealed.

The appeal came on to be heard on the 8th of May, 1876. *Southgate*, Q.C., Sir *H. James*, Q.C., *Davey*, Q.C., and *Stirling*, for the defendants: After stating the case, and referring to *Ralston v. Smith* (¹), and reading the evidence, they were stopped by the court.

Kay, Q.C., *Fry*, Q.C., *Aston*, Q.C., and *Tremlett*, for the plaintiff: First, with regard to the personal objection made to the plaintiff, as being incapacitated by his official position from taking out this patent. The objection, if valid, may be a ground for recalling the letters patent, but so long as they remain unchallenged they must be treated as valid, and enforced by this court. But we contend that the objection is untenable, for there is no reason or authority for preventing any man from making use of knowledge acquired in the course of a paid employment, to produce an invention, unless he is bound by some contract with his employer not to do so. Indeed, the men who make improvements are generally those who become conversant with the particular subject in the course of their ordinary employment, as in the case of Captain Boxer's improvements in cartridges. The plaintiff was bound by *no contract or duty towards [828 the defendants to give them the benefit of his discoveries. It was not the duty of the gas referees to advise the defendants how to purify their gas, or to investigate their processes, but only to see the results of the processes, and to fix the maximum of impurity allowable. The plaintiff could not oblige the defendants to try any particular process which he might think better than theirs; and if he knew of a better method than they did, he was quite as free to take out a patent for it as a stranger. If any one had a right to claim the benefit of the plaintiff's invention, it was the Board of Trade, whose servant he was. He was not employed by the gas companies; on the contrary, he was intended to be a check upon them, and to see that they conformed to the regulations imposed upon them.

With respect to the charge of want of novelty which is brought against all the improvements except that contained in the second claim, we say that the burden is not on us to prove novelty. It is for those who deny novelty to prove instances of prior user. This the defendants have not done; they have merely alleged generally that the inventions are

(¹) 11 H. L. C., 223.

not novel: *Bovill v. Goodier* (1); *Daw v. Eley* (2); *Bovill v. Smith* (3); *Finnegan v. James* (4).

The defendants also object that there is no "practical value" in the inventions. It is not necessary to prove practical value. We have proved some utility in them, and any amount of utility is sufficient to support a patent: *Morgan v. Seaward* (5); *Betts v. Walker* (6).

It is also alleged that the claims, and especially the fifth claim, are too general. That is not the case if the whole specification is read together, and that must always be done in construing a claim: *Kay v. Marshall* (7); *Beard v. Egerton* (8); *Arnold v. Bradbury* (9).

With respect to the second claim, against which the main arguments and evidence were directed in the court below, it is said that it is not a proper subject for a patent, being 829] simply an improved use of an old process. That is not so; the plaintiff proposes a new process, an entire change in the *modus operandi*, by which the carbonic acid may be eliminated and the sulphuretted hydrogen driven forward, which had never been done before; and he claims the discovery of the scientific principle involved in the operation, and the invention of the best method for applying it. Patents have been repeatedly granted on similar grounds: *Neilson v. Harford* (10); *Crane v. Price* (11); *Hellicell v. Dearman* (12); *Ralston v. Smith* (13); *Young v. Fernie* (14); *Muntz v. Foster* (15); *Hills v. London Gas Light Company* (16).

Lastly, it is objected that the improvements contained in the second claim had been anticipated by experiments in the defendants' works. It may be true that they had made experiments tending towards the same invention, but they had been unsuccessful, and had produced no practical result. The mere fact of experiments being made in the same direction is not an anticipation of an invention: *Bentley v. Fleming* (17); *Galloway v. Bleaden* (18); *Murray v. Clayton* (19); *Betts v. Menzies* (20); *Hill v. Evans* (21); *Jones v. Pearce* (22); *Lewis v. Marling* (23).

(1) Law Rep., 1 Eq., 35.

(2) Law Rep., 1 Eq., 38.

(3) Law Rep., 2 Eq., 459.

(4) Law Rep., 19 Eq., 72.

(5) 2 M. & W., 544.

(6) 14 Q. B., 363.

(7) 1 My. & Cr., 873.

(8) 8 C. B., 165.

(9) Law Rep., 6 Ch., 706.

(10) 1 Webs. Pat. Ca., 331.

(11) Ibid, 393; S. C., 4 My. & Cr., 580.

(12) 1 Webs. Pat. Ca., 401 (n.)

(13) 11 C. B. (N.S.), 471; 11 H. L. C., 223.

(14) 4 Giff., 577.

(15) 2 Webs. Pat. Ca., 92.

(16) 5 H. & N., 312.

(17) 1 Car. & Kir., 587.

(18) 1 Webs. Pat. Ca., 531.

(19) Law Rep., 7 Ch., 570.

(20) 11 W. R., 1.

(21) 4 D. F. & J., 288.

(22) 1 Webs. Pat. Ca., 121.

(23) 1 Webs. Pat. Ca., 493.

JAMES, L.J., delivered the judgment of the court (James, L.J., Baggallay, J.A., and Lush, J.) as follows:

This suit has been instituted under very peculiar circumstances. The plaintiff was one of a body of public officials appointed under the provisions of the Metropolitan and City of London Gas Act of 1868, called gas referees. Their powers, functions, and duties, so far as it is material to refer to them, are contained in the following sections of the act: [His Lordship then read the 34th, 35th and 36th sections of the act before referred to.]

In the performance of his duties, the plaintiff was in constant communication with the managers of the Metropolitan Gasworks, and became intimate with their processes and their results. As the object of the appointment of the referees was to secure for the public gas of the utmost purity which could reasonably be required of the companies, it was, of course, their duty to ascertain what, under all the circumstances of each case, would be a reasonable requisition, and in the performance of this duty to discuss with and to suggest to the managers, as practical men, and to discuss with and to suggest to one another, the existing impurities, the probable cause of them, and the best means practically available for removing such causes. The gas companies had failed to supply to the public a gas which did not contain a very considerable amount of sulphur, and not only was that amount excessive, but the gas showed, according to the plaintiff, variations in that amount from day to day, which the makers could not account for. With the same coal, the same process of manufacture, the same purifying process, the gas came out sometimes very pure and sometimes very impure. Revolving these things in his mind, the plaintiff says that he discovered the cause of the defect, and with it a simple and effectual means of removing such cause. The discovery may be stated shortly thus: After a certain preliminary process of purification in what are called washers and scrubbers, the gas, which was still very impure, containing a large quantity of carbonic acid, sulphuretted hydrogen, and other sulphur compounds, was passed through purifiers containing lime and oxide of iron. The oxide of iron would absorb and remove sulphuretted hydrogen, but had little or no effect on the other sulphur compounds. The lime was capable of absorbing the carbonic acid, and also the sulphuretted hydrogen, but had no effect, as lime, on the other sulphur compounds; but, in absorbing the sulphuretted hydrogen, it became a sulphide of calcium, in which state it was a

very efficient agent for removing the other sulphur compounds. The lime was therefore capable, first as lime and then as sulphide of calcium, of removing the carbonic acid and the sulphuretted hydrogen, and to a great extent the other sulphur compounds. But the plaintiff, as he alleges, discovered that a great chemical truth had been overlooked or neglected—viz., that carbonic acid would decompose sulphide of calcium, and set free again the sulphur which had been absorbed, and he therefore discovered, what had been 831] overlooked, that it *was essential that the gas should be entirely deprived of its carbonic acid in the first instance. The lime in the subsequent purifier or purifiers would then be partly pure lime, partly sulphide of calcium. The lime would go on absorbing sulphuretted hydrogen until it became wholly sulphide of calcium, and the sulphide of calcium would continue taking up the other sulphur compounds. When this truth presented itself to the plaintiff's mind the remedy was very obvious. From the great affinity between lime and carbonic acid it is easy to absorb the latter, and practically speaking, carbonic acid would not escape from a vessel containing lime, unless and until the latter had been converted into a carbonate. Having satisfied himself by deduction and by experiments that the solution of the sulphur difficulty was to be found in the proper use of the affinity between carbonic acid and lime, he confidentially informed his colleagues of his discovery, and, as alleged, it was with his permission that the description of his lime process was given in the report next to be mentioned, and with a perfect understanding on their part that he was to take out a patent for his said discovery before the issue of the report. The report contains the first statement of the discovery; it is the first piece of writing in which anything is formulated or stated with respect to it. The report bears date the 31st of January, 1872, and appears to have been in print about that time. In that report no mention is made by the referees of any special discovery by one of them, or of any intention to patent it by any of them. The report is a long document. It is headed, "Report on Sulphur Purification at the Beckton Gasworks by the Gas Referees." It purports to give an account of what has been done at the Beckton Works of the defendants, and under the head "Remedies" it proceeds thus (*inter alia*): "The prime object to be sought is to utilize and perfect the existing processes of purification. The referees feel confident that such a result is obtainable. From experiments which they have made they can state

that lime in the form of sulphide of calcium—i.e., saturated with sulphuretted hydrogen—is a perfectly adequate purifying agent for sulphur.” And again: “The referees feel assured that perfect results would be obtainable from the lime process of purification if carbonic acid were excluded from the purifiers.” *The experiments are [832 described as their experiments, made at their office, and all the recommendations and suggestions are made as the official recommendations and suggestions of the whole body, based upon facts officially ascertained for and by them, and the whole report purports to be the production of the whole body, each of them applying, as in duty bound, his intellect and mind to the subject. The report was kept back from the official authorities until the 26th of March, and a few days afterwards it was circulated among the gas companies and generally. It would have been immediately the duty of the officers of the gas companies to adopt the suggestions of the report (if they had not previously done so), and it became immediately the duty of the referees to fix the maximum of impurity to be permitted, having regard to the means suggested by them. The plaintiff says that in fact this was done, that such a maximum was fixed, and that the defendant company did adopt, and with great success, the plan of the referees. For months the report was discussed, written about, and lectured upon as the referees’ report, and they themselves, in subsequent reports, referred to it by that designation. It was an official document emanating from the plaintiff and others; inviting, and intended and calculated to compel the gas companies to use the means therein described, and without any intimation that there was any patent right or private property of the plaintiff, or any one, in that which, to all appearance, was given to the public as public property. It appears, however, that on the 9th of March, the plaintiff had presented his petition for letters patent for improvements in the purification of coal gas, lodging the usual provisional specification. Letters patent were sealed on the 28th of May. On the 9th of September the complete specification was lodged; and then it appeared that the plaintiff had obtained a patent for that which was in substance and effect the referees’ report, and he has filed a bill against the defendants for having infringed such his patent right by doing the very things which they were so officially instructed, invited, and, in effect, commanded by him to do. Although it is not necessary for the determination of this suit to pronounce any final decision on this point, we deem it right to say that we

think it, at the very least, very questionable whether it can 833] be competent for *a member of an official commission or committee to take out a patent for the subject-matter of their official investigation, for the results of such investigation embodied in their official report to the public authorities, or to treat as piratical infringers those who have followed the suggestions and directions contained in such report. The suggestion that the report was kept back for the purpose of enabling one of the referees to apply for a patent is not entitled to much favor. It is to be borne in mind that the report then made belonged absolutely to the state. Every fact and figure in it had been ascertained and obtained at the public expense; every hour of every referee, and of the secretary employed in the production of it, was public time. It was, of course, printed at the public cost. The withholding or wilful delaying of it was a plain breach of public duty, and it is difficult to see how the plaintiff can be in a better position than if he and his colleagues had done their duty and duly presented their report as soon as it was completed. The consideration for every patent is the communication of useful information to the public. What consideration is there when the information was already the property of the state?

The specification of the patent claims five different matters. If one of them is bad, as there has been no disclaimer, of course the patent must fail, and the defendants insist that every one of them is bad.

[His Lordship read the first claim, and continued:]

There is really in this nothing but the enunciation of a chemical truth; that pure sulphides of calcium will absorb the sulphur compounds. The plaintiff believed that he had discovered that chemical truth, although it had been taught for many years in many books, and was well known to chemists. There is no invention of any particular process or means of employing the pure sulphide of calcium. If pure sulphide of calcium is to be used it must be used in some separate holder of it, and the thing holding it would be a separate purifier, and there is nothing, therefore, in any previous part of the specifications to limit the universality of the claims to the employment of sulphides of calcium for the removal of sulphur in other forms than sulphuretted hydrogen. It is obviously impossible to support such a 834] claim as that, which *was plainly based on the plaintiff's mistaken idea that he had discovered that peculiar property in sulphide of calcium. Passing over for the moment the second claim, which has been the principal

subject of controversy in evidence and argument, the defendants challenge absolutely the novelty and utility of the other three. The plaintiff so challenged has failed to produce any evidence that they are of the slightest value. The defendants' evidence is, in general terms, that they have been tried and abandoned.

[His Lordship then referred to the plaintiff's evidence and continued:]

This evidence is utterly valueless as evidence of novelty and utility. The improvements have not been tried by the plaintiff, or any of his witnesses, even experimentally, in a laboratory, or with models. The one experiment made by the plaintiff, showing that a mixture of sulphur and sawdust in a tumbler removed a certain quantity of sulphur from the gas supplied to the office is evidence of that chemical fact, but not evidence that the fact is of the slightest practical utility. In our opinion the plaintiff has failed to prove either the novelty or utility of anything claimed under any of the last three heads.

The great controversy of fact and argument, as before stated, has related to the second head of claim, which is as follows: [His Lordship read the second claim, and continued:] There is in that no suggestion of any new apparatus—of any new process. There is no device or scheme of any kind. Lime purifiers in succession were in general, almost universal use, wherever lime could be freely used. The gas entered one, passed from that to another, and then generally, or sometimes, to a third; the gas, partly purified in the washers and scrubbers, passed through the series of lime purifiers into an oxide of iron purifier. That was the process before, and that is to remain the process after and under the plaintiff's patent. What he claims to have discovered is, that if the carbonic acid, which is the first thing taken up by the lime, is not wholly taken up at the beginning, and is allowed to enter the last purifier or purifiers, it in fact poisons the latter, decomposes the sulphide of calcium already formed, disengages the other sulphur absorbed by the sulphide, and of course fills the gas again *with the sulphur impurities which had been re- [835 moved. This is a very valuable working caution and direction, but it is impossible to make anything more of it than a working caution and direction. It really amounts to nothing more than a direction to be sufficiently liberal in the use of the caustic lime in the first stage, and an instruction that the moment it is so far carbonated as not to arrest the carbonic acid, it should be removed and a fresh supply

of lime got. It may be a direction and instruction of the greatest possible value and utility, but it is utterly impossible to make such a direction and instruction, however valuable, the subject of a patent. It does not differ in principle, although it does differ enormously in scale, from a cook's instructions and directions as to the best means of manipulating articles of food. How could an infringement of such a patent be predicated? Would it do to say, in the days of your uninstructed ignorance you allowed the lime to remain three or four days; now that I have taught you better you remove it every forty-eight hours? Could the court say in words (if not in words, could it in effect say), we restrain you from working your lime purifying process in any such way as will not allow the carbonic acid to enter the last purifier in sufficient quantity to do substantial mischief, or in less quantity on an average than it used to do in former times on an average? No one has a right to prevent a workman from using care to keep his tools in the most efficient state. No one has a right to prevent a manufacturer from cleansing his vessels, and throwing away the useless contents whenever he likes, or to ask him his motives or intentions in doing so.

Besides this, however, the defendants insist that what they are doing now, and which is alleged to be the infringement of the patent at their Beckton Works, they were doing at those works before the date of the patent, and that what they are doing at their Bow Works they had been doing for years. The evidence on this subject on the part of the defendants is absolutely overwhelming. It is direct, positive, and unequivocal, and, if false, it must be wilfully false and perjured within the knowledge of scores of persons, and against this there is merely the speculative conclusion derived from results. The plaintiff says: "Up to a certain time before you knew of my process, as described 836] in the referees' report, *you failed to purify your gas properly; since you became acquainted with my process you have purified your gas effectually. The conclusion is inevitable that you have made some change, and as you are using my process, you must have been using something not my process before, and your evidence to the contrary must be disregarded." We cannot so deal with such a body of witnesses and such a mass of evidence, including unmistakable documentary evidence, which was in existence before the date of the letters patent.

On the 15th of February, 1872, the plaintiff writes to Mr. Trewby, as follows:—

"As carbonic acid has a greater affinity for lime than S. Hyd. has, it may be confidently expected that a tray of clean lime will take out C. A. in greater proportion than it takes out S. H. . . . Or perhaps (you can judge best) you might pass all your gas in each purifying house through one purifier first, and change the lime in this one quickly, as the back pressure shows it turned into carbonate, or else as soon as it gets foul."

And on the 29th, Mr. Trewby writes as follows:—

"I may add that within the last few days, I have been working the lime purifiers in a somewhat different manner. That is to say, I have kept certain purifiers for the purpose of testing the carbonic acid only and the remainder for the sulphur. I am in hopes that this will do good."

Mr. Trewby swears, and there is not the slightest reason to doubt his evidence, that what is stated in that letter is according to the facts, and that being so there was a clear prior user. The letter contains, moreover, a clear anticipation of the exact principle which the plaintiff claims to have been the first discoverer of.

Dr. Letheby swears, as to what he found on the 11th of March, when he visited the defendants' works:—

"I found that the company were working four purifiers in a set, the first two being for carbonic acid and the last two for sulphur; and when the first vessel showed an effluent with carbonic acid it was changed, and the succeeding purifier brought into action. In fact, the process of the plaintiff, as described in the provisional specification, was strictly carried out."

*And the date of his visit, and what was shown [837 him on that day, are conclusively corroborated, if they required corroboration, by Mr. Evans's diary of that date. It is possible that what Mr. Trewby said and did on the 29th of February, and a few days before, may be accounted for by what the plaintiff says in his letter of the 27th of March, 1872: "All the suggestions in the report have been communicated to Trewby and others months ago."

We are satisfied that Trewby's evidence is true, and Trewby's letter genuine; we are satisfied that Dr. Letheby's evidence is true, and Evans's diary genuine. We do not think it necessary to go any further into the details of the evidence.

Whether the defendants have sufficiently accounted for

the difference in the results produced in different parts of the year 1872, or what was or were the cause or causes of such difference, opens a field of speculation into which we are not called upon to enter. It cannot affect the fact (as to which there is no legitimate ground for doubt) that prior to and on the 9th of March, 1872, the process described in the plaintiff's specification was in actual use and work at Beckton, and that a process in principle and substance the same was in actual use and work at Bow. It is possible, indeed probable, that the company became more liberal in the supply, and the manager more careful in the use, of the lime. But that is, in our judgment, wholly immaterial. The plaintiff's case has, in our judgment, wholly failed, and his bill must be dismissed with costs, including the costs of the appeal.

Solicitors for appellants: *Curtis & Bedford.*

Solicitors for plaintiffs: *Bevan & Whitting.*

END OF VOLUME II.

[3 Chancery Division, 1.]

C.A., May 1, 1876.

***In re EUROPEAN ASSURANCE SOCIETY ARBITRATION [1
ACTS AND INDUSTRIAL AND GENERAL LIFE ASSURANCE
AND DEPOSIT COMPANY.**

COCKER'S CASE.

Novation—Amalgamation of Companies—Transfer of Liabilities—Duty to set apart Fund—Acquiescence by Policy-holder.

By the deed of settlement of the I. insurance company it was provided that the funds and property of the company should alone be answerable for claims on the company; provision was also made for enabling the proprietors to dissolve the company, and thereupon the directors were to obtain from some other company an undertaking to pay the claims on the I. company, and were to transfer to such other company so much of the assets as should be agreed upon as sufficient to meet such claims. The I. company was accordingly dissolved, and a portion of its funds transferred to the E. company, which covenanted to satisfy the liabilities of the I. [2 company.

C. was a policy-holder of the I. company on the non-participating scale, and as such was not entitled to a vote at the meetings of members. His policy was made subject to the conditions of the deed of settlement. He had notice of the intended amalgamation, but had no formal notice of the completion of the amalgamation, nor was his policy indorsed by the E. company. He, however, paid the premiums and took receipts in the name of the E. company for fifteen years, after which both companies were ordered to be wound up, and came under the European Assurance Society Arbitration Acts:

Held, first, that there was no obligation on the I. company to see that the assets transferred to the E. company were appropriated for the payment of the claims on the I. company; that the amalgamation, being *intra vires*, was binding on the policy-holders, as in *Holt's Case* (1):

Secondly, that even if it had not been binding on the policy-holders generally, C. was bound by his conduct, and had accepted the liability of the E. company.

THIS was an appeal from a decision of Lord Romilly, as arbitrator under the European Society Arbitration Act, 1873, whereby he decided that Matthew Cocker was not entitled to rank as a creditor of the Industrial and General Life Assurance and Deposit Company under a policy of life insurance effected with that company.

The policy, which bore date the 22d of July, 1851, was effected by Cocker on the non-participating scale on the joint lives of himself and Sarah Ann Cocker, his wife, for the sum of £100, at the yearly premium of £2 0s. 6d. It was executed by three directors and sealed with the company's seal, and it was thereby witnessed that if the premiums were punctually paid at the office of the company, the funds and other property of the said company should be liable, according to the provisions of the deed or deeds of settlement of the said company, to pay to the said assured,

(1) 15 Eng. R., 762.

his executors, administrators, or assigns, within three months after satisfactory proof had been given of the death of either of the said M. Cocker and Sarah Ann Cocker, the sum of £100: Provided always that the capital stock of the company, or so much thereof as for the time being should have been subscribed, and the other stocks, funds, securities, and property of the said company remaining at the time of 3] any claim or demand made, *unapplied, and undisposed of, and inapplicable to prior claims and demands, in pursuance of the trusts, powers, and authorities contained in the said deed or deeds of settlement, should alone be liable to answer and make good all claims and demands upon the said company under or by virtue of the said policy and all other policies; and that no director, proprietor, or member of the said company, his heirs, executors, or administrators, should by reason of any policy of assurance or instrument securing annuities, or of the whole of the policies of assurance, and instruments securing annuities taken together, which any director had signed or might sign, be in anywise individually or personally liable or subject to any claims or demands against the said company beyond the amount of the unpaid part of his particular share or shares in the said capital stock, or in such part of the said capital stock as for the time being should have been subscribed.

The Industrial Company was formed under a deed of settlement dated the 10th of December, 1849, and was completely registered under the Joint Stock Companies Act, 1844 (7 & 8 Vict. c. 110).

The following clauses were specially referred to in the argument:—

By clause 2 it was provided that the word “members” should mean all persons who had assured with the company on the terms of participating in the profits of the company; and that the word “assured” should mean all persons, either members or not, who should have effected any policy of assurance, or grant of annuity, endowment, or other premium from the company.

By clause 20 it was provided that every proprietor and member present at a general meeting should be entitled to vote at that meeting.

Clause 190 was as follows: “It shall be lawful for an extraordinary board of directors, specially called for the purpose, to enter into a resolution recommending the dissolution of the company, and upon such dissolution being so recommended the same extraordinary board shall cause an extraordinary general meeting to be convened for the pur-

pose of taking into consideration the propriety of dissolving the company; and if at such extraordinary general meeting a resolution shall be entered into for dissolving the company, then the board of directors shall call a second extraordinary *general meeting, for the purpose of con- [4
firming or rejecting such dissolution; and such second extraordinary general meeting shall be held within the space of forty days after the resolution for dissolving shall have been entered into at the first extraordinary general meeting; and if such resolution for dissolving shall have been confirmed at such second extraordinary general meeting, then from the time of such confirmation the company shall be dissolved, and the business thereof shall be concluded.”

Clause 191 was as follows: “That immediately upon the dissolution of the company the board of directors shall, out of the funds or property of the company, pay and satisfy all the immediate claims and demands on the company arising from assurances or other contracts or engagements, and shall obtain from some other assurance company, or from the directors or managers of some other assurance society or company, an undertaking to pay and satisfy the remainder of the claims and demands on the company arising from assurances, annuities, or other contracts or engagements, when and as the time for the payment and satisfaction of the same shall respectively arrive; and shall cause to be transferred to some other assurance company, or to some of the trustees or directors of such other assurance society or company, so much of the funds or property of the company as shall be agreed upon between the contracting parties, as will be sufficient, with the premiums that may become payable in respect of all their existing policies, to enable the society or company from whom or from whose directors or managers the undertakings shall have been obtained to comply therewith, and shall make such arrangements with the said assurance company or the said directors or managers in regard to the said undertakings as the board of directors shall in their discretion think fit, and shall cause to be done and executed all such acts, deeds, and things as in the opinion of the board of directors shall be necessary or advisable for carrying the same engagements into effect: and if any funds or property of the company shall remain after answering the purposes aforesaid, shall cause the same, or so much as shall not consist of money, to be sold, got in, or otherwise converted into money, and shall cause the moneys arising from the said remaining funds or property, or *of [5
which the same shall consist, to be paid and distributed at

such time or times as they shall think fit, to and amongst the proprietors and other holders of shares in the temporary capital of the company and the members, according to their respective rights and interests therein; and notwithstanding the dissolution of the company, these presents and the provisions herein contained, and all powers, privileges, rights, and duties of the proprietors and other holders of shares and members, including the powers to call and hold extraordinary general meetings of proprietors and members, and the power to call for and enforce the payment of further instalments or shares, shall until all claims and demands shall have been respectively satisfied and provided for as aforesaid, and until a final decision shall have been made of the residue (if any) of such moneys as aforesaid, remain and continue in full force, so far as the same may be necessary for winding up the concerns of the company, and for enabling the board of directors to dispose of the funds or property of the company, and to satisfy and provide for such claims and demands, and to make such payments and distribution as aforesaid."

Another company, called the People's Provident Assurance Society, was established under a deed of settlement dated the 2d of September, 1854, and was completely registered under the Companies Act, 1844.

In September, 1855, negotiations were carried on between the Industrial Company and the People's Provident Society for an amalgamation, and on the 23d of October, 1855, a report of the directors of the Industrial Company was issued to the shareholders and policy-holders of the company, which stated the terms of the proposed amalgamation, and recommended its adoption. Although by the constitution of the company Matthew Cocker, not being a participating policyholder, was not properly a member of the company, and was not entitled to vote at the meetings, it was admitted, for the purpose of the special case, that he received a copy of this report.

The amalgamation was agreed to and confirmed by extraordinary general meetings of the members and shareholders, and was carried into effect by a deed dated the 6th of November, 1855, and made between the two companies. By [6] this deed the *two companies mutually covenanted that immediately on the dissolution of the said Industrial Company the whole business, assets, and property of the company should be consolidated and amalgamated with the business, assets, and property of the People's Provident Society, and the said society should continue as theretofore to be regu-

lated in all respects by the said deed of settlement of the 2d of September, 1854; that, accordingly, upon the said amalgamation, the present manager of the said Industrial Company should be the manager and secretary of the People's Provident Society; that as soon after the completion of the said amalgamation as circumstances would permit, the business of the People's Provident Society should be principally carried on at No. 2 Waterloo Place, the present principal office of the Industrial Company; and by the last clause, that the People's Provident Society should pay and satisfy all the claims and demands on the said Industrial Company arising from assurances, annuities, or other contracts or engagements whatever, when and as the times for payment or satisfaction of the same should respectively arrive, and should indemnify the Industrial Company and each of the members and shareholders against all such claims and demands.

After the amalgamation, the business of the united companies was carried on at No. 2 Waterloo Place, the late office of the Industrial Company, under the name of the People's Provident, Industrial and General Life Assurance Society.

Cocker's policy was not indorsed by the People's Provident Society, nor was any new policy issued. He did not receive any formal notice of the completion of the amalgamation.

By the European Society's Act, 1859, the People's Provident Society was incorporated with and its name changed to that of the European Assurance Society, and the business was carried on under the new name at the same offices.

The European Society was ordered to be wound up by an order dated the 12th of January, 1872, and the Industrial Company by an order dated the 7th of June, 1872.

The premiums on Cocker's policy were paid by him at the office in Waterloo Place until the date of the winding-up. Before the amalgamation with the People's Provident Society the receipts were headed "The Industrial and General Life Assurance and *Deposit Company." After the [7 amalgamation they were headed "The People's Provident Assurance Society, with which is incorporated the Industrial and General Life Assurance Company," until the incorporation of the company with the European Society, and they were then headed "The European Assurance Society."

Lord Romilly, as arbitrator, under the European Assurance Society's Arbitration Acts, decided that Cocker was not entitled to prove against the Industrial Company.

1876

Cocker's Case.

C.A.

In giving judgment on the 18th of November, 1874, his Lordship said: "I am of opinion that Mr. Cocker assented to the arrangement indicated by the circular, and that he assented to the terms of the deed of the 6th of November, 1855, by which it was carried into effect. I am also of opinion that the fact of Mr. Cocker having paid his premiums after the year 1855, and taken receipts for the same in the form referred to in the case, is evidence that he looked to the European Society for payment of the moneys assured by his policy, and intended to release the Industrial Company. I am still more strongly confirmed in this view by finding that a case similar to this has been before me at the Rolls. In *Carr's Case* (*) a policy-holder was bound by years of acquiescence in a similar arrangement, whereby he paid his premiums to another company, and acted in every way upon it. The objection there was that a formality in the deed of settlement had not been observed; I held that he was bound, whether there was any clause of dissolution in the deed of settlement or not, and whether, if there was, it had been observed in the deed of amalgamation or not."

Mr. Reilly, the present arbitrator, having certified that it was a proper case for appeal, Cocker appealed from Lord Romilly's decision.

Waller, Q.C., and *J. Wilkinson*, for the appellant: The present case is in many respects similar to *Hort's Case* (*), but it differs from it in some important particulars. In *Hort's Case* the policy-holder received notice of the completion of the amalgamation of the companies, and was invited to send in his policy to be indorsed, which he accordingly [8] did. No such notice *was given to Cocker, nor was his policy indorsed. He only paid his premiums at the office, which was the old office of the Industrial Company, and accepted the receipts which were sent him. This was not sufficient to show his consent to the amalgamation: *Conquest's Case* (*). It is true that, according to *Hort's Case* (*), his consent was not necessary if the amalgamation was properly carried out within the powers of the deed of settlement; but we contend that this was not the case. The intention of the deed was, that the Industrial Company should calculate and hand over a sufficient fund to the new company to satisfy the policy-holders, and the fund should have been kept separate and ear-marked for their benefit. In *Wood's Case* (*), where there was a similar clause, Lord Cairns says: "The clause contemplates that this fund should be ear-

(*) 33 Beav., 542.

(*) 1 Ch. D., 307.

(*) 1 Ch. D., 334.

(*) Reilly's Alb. Arb. Cas., 54, 58.

marked and appropriated in some way when the amount should have been ascertained, so that there might be added to it the premiums on the policies transferred, and so that it might be ascertained that the fund transferred and the accruing premiums would be sufficient to pay the policies, the liability on which was transferred." That case is exactly in point.

Higgins, Q.C., and *Romer*, for the official liquidator, were not called on.

LORD CAIRNS, L.C.: We have no hesitation in saying that we think this case governed by the decision in *Hort's Case*. The case to which Mr. Waller has referred (*Wood's Case* (')) would not necessarily be binding on this court, being a decision in the Albert Arbitration; but my present impression is that the deed in that case had certain peculiarities which do not appear in the present case. But whether that be so or not, it appears to us that the deed in the present case is exactly the same for the present purpose as that which this court had to consider in *Hort's Case*. We think there was here a deed by which the policy-holder was bound, and that the contract of the policy-holder being that the assets of the company should be liable to him according, and only according, to the *provisions of the deed of settlement, any- [9 thing that was done with those assets, justified by the terms of the deed of settlement, was an appropriation of the assets to which the policy-holder could not object.

But there was here *bona fide* an arrangement agreed upon between the two companies, the Industrial and the People's Provident, for amalgamation. It was an amalgamation in the strictest sense of the term, for every shareholder in the Industrial was to become a shareholder in the People's Provident. The mode in which the amalgamation was carried out was by a dissolution of the Industrial according to the terms of the deed of settlement, and after a resolution at some general meetings according to the deed had been come to. A further mode in which the amalgamation was to be carried out was by handing over, consequent upon a dissolution, the whole of the assets of the Industrial Company to the People's Provident Society, and then the only diminution or subtraction from those assets was this, that inasmuch as the value of a share in the Industrial Company was upon calculation taken to be greater than the value of a share in the People's Provident, every shareholder in the Industrial Company was to receive not merely a share in the People's Provident in exchange, but also a bonus of

(¹) Reilly's Alb. Arb. Cas., 54.

1s. in cash, representing the greater value of the share which he gave up. The payment of that 1s. a share was in the nature of an advance or distribution of the surplus assets, as it were, of the Industrial Company, after providing for all the claims upon it, and a distribution of surplus assets of that kind was warranted by the provisions of the deed of settlement. In our opinion, therefore, the provisions of the deed of settlement were complied with. I cannot read the clause of the deed now before us, at all events, as meaning that upon an arrangement of this kind the assets handed over to the transferee company were to be ear-marked and kept separate for the purpose of being applied to the payment, and only to the payment, of liabilities accruing on policies of the old company. In my opinion, the meaning of the clause of the deed now before us is this, that the assets handed over to the transferee company would become assets generally of the new company. That was done in this case, and I may add that Mr. Cocker having 10] had notice before, in the clearest and most *express terms, that an amalgamation was about to take place, warranted, as the two companies conceived, by their deeds of settlement, had notice subsequently within a year that the amalgamation had actually taken place; he had that notice by the receipt that was given to him on the next payment of his premium, and he continued to have that notice for many years afterwards. If he desired to investigate the details of the arrangement for amalgamation—still more, if he desired to make any objection to those details, the time for him to have done so would have been on receiving the notice that the amalgamation had taken place. Instead of that he remained for fifteen years paying the premiums on the footing of the amalgamation, and during all that time he was entitled, if the amalgamated company had been a success and had turned out prosperously, to the advantages he would thereby have derived, and it is not until after the state of insolvency of that company is ascertained that this claim is made to go back to the old company, and to assert his right against it. I repeat that it is my opinion, and also the opinion of my learned colleagues, that the case is entirely governed by the *ratio decidendi* in *Hort's Case*. The same order will be made as to costs as in *Hort's Case*.

JAMES, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for appellants: *Stevens, Wilkinson & Harries*.

Solicitors for respondents: *Mercer & Mercer*.

An action lies on a promise made by the defendant upon valid consideration to a third person for the benefit of the plaintiff, although the plaintiff was not privy to the consideration.

Such promise is to be deemed made to the plaintiff, if adopted by him, though he was not a party to nor cognizant of it when made. So held where A. loaned money to the defendant upon his promise to pay it to the plaintiff, to whom A. stated that he owed and had promised to pay the like sum; there being no other evidence of the fact than such declaration: *Lawrence v. Fox*, 20 N. Y., 268; *Moak's note*, *Clarke's Chy.*, 393 marg. p.; *Judson v. Gray*, 17 How. Pr., 289; *Berry v. Mayhew*, 1 Daly, 54, 57; *Delaware, etc., v. Westchester, etc.*, 4 Denio, 97; *Farley v. Cleveland*, 4 Cowen, 432, 9 id., 639; *Connor v. Williams*, 2 Rob., 46; *Hale v. Boardman*, 27 Barb., 82; *Seaman v. Hasbrouck*, 35 Barb., 151; *Artcher v. McDuffee*, 5 id., 147; *Stoddard v. Graham*, 23 How., 532; *Scott v. Pilkington*, 15 Abb. Pr., 280; *Baker v. Bucklin*, 2 Den., 45; *Steele v. Babcock*, 1 Hill, 527; *Weston v. Barker*, 12 Johns., 276; *Schermerhorn v. Vanderheyden*, 1 id., 139; *Cornegie v. Morrison*, 2 Met., 401-4; *Mellin v. Whipple*, 1 Gray, 317, 320-324; 1 Am. Lead. Cas. (5th ed.), 804; 1 Smith's Lead. Cas. (7th Am. ed.), 282; 1 Throop's Verbal Agreements, §§ 295-320.

See *Bishop's First Book of the Law*, §§ 467-9; *Hoffman v. Schwaeb*, 33 Barb., 194; *Commercial, etc., v. Norton*, 1 Hill, 501; *Webb v. Rowe*, 35 Mich., 58.

Canada, Upper: *Jackson v. Evan*, 21 C. Pl., 33; *Hine v. Beddome*, 8 id., 381; *Kissock v. Woodward*, 1 Q. B., 344; *Coates v. Lloyd*, 3 id., 51; *Ferguson b. Kerr*, 5 id., 261; *McDonald v. Glass*, 8 id., 245; *Gerow v. Clark*, 9 id., 219; *Lee v. Mitchell*, 23 id., 314; *Canada, etc., v. McDonald*, 25 id., 384.

Illinois: *Steele v. Clark*, 77 Ills., 471. But see *Goodenow v. Jones*, 75 Ills., 48.

Indiana: *Haggerty v. Johnston*, 48 Ind., 41; *Crim v. Fitch*, 53 Ind., 214.

Iowa: *Ream v. Jack*, 44 Iowa, 325; *Chamberlain v. Ingalls*, 38 id., 300; *Lamb v. Tucker*, 42 id., 118.

Kansas: *Grant v. Penderrey*, 15 Kana., 236.

Massachusetts: But see *Ellis v. Clark*, 110 Mass., 389.

Michigan: *Taylor v. Whitmore*, 35 Mich., 97.

But see *Halsted v. Francis*, 31 Mich., 113; *Webb v. Rowe*, 35 Mich., 58.

Minnesota: See *Sullivan v. Murphy*, 28 Minn., 6.

Missouri: *Holt v. Dollarhide*, 61 Mo., 433; *Rogers v. Gosnell*, 58 id., 589.

New Jersey: *Crowell v. Currier*, 27 N. J. Eq., 153; affirmed id., 650; *National Bank v. Segar*, 39 N. J. Law R., 173.

New York: *Lawrence v. Fox*, 20 N. Y., 268; *Burr v. Beers*, 24 id., 178; *Ricard v. Sanderson*, 41 id., 179; *Thorp v. Keokuk, etc.*, 48 id., 253; 47 Barb., 446; *Becker v. Torrance*, 31 N. Y., 631, 643; *Dingeldein v. Third, etc.*, 37 id., 575; *Arnold v. Nichols*, 64 id., 117; *Secor v. Law*, 4 Abb. Court App. Dec., 188; *Silliman v. Tuttle*, 45 Barb., 170; *Connor v. Williams*, 2 Rob., 46, 51; *Hope, etc., v. Perkins*, 4 id., 187, affirmed 38 N. Y., 404, 2 Abb. Court App. Dec., 383.

See *Martin v. O'Conner*, 43 Barb., 514, 523; *Davis v. Morris*, 36 N. Y., 569, 575; *Dolph v. White*, 12 id., 296; *Kelly v. Roberts*, 40 N. Y., 432.

United States: *Hendrick v. Lindsay*, 98 U. S., 143.

Wisconsin: *McDowell v. Laer*, 35 Wisc., 171; *Pictney v. Farnum*, 27 id., 187.

See *Gaston v. Owen*, 2 North Western Reporter, 142.

If A. delivers goods to B. for work B. does for C., under an agreement with C. that C. shall pay A. for the goods so delivered, such agreement is valid and not within the statute of frauds: *Mather v. Perry*, 2 Denio, 162.

See 1 Am. Lead. Cas. (5th ed.), 804; 1 Smith's Lead. Cas. (7th Am. ed.), 282.

Where one engaged in business enters into a copartnership with another for continuing the business, and transfers its assets to the firm in consideration of an agreement by the firm to assume and pay certain specified debts incurred in the business, and to apply the assets first to the payment of said debts, the agreement is to be deemed as made for the benefit of the creditors holding the claims specified, and an

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action may be maintained by such a creditor against the firm upon such agreement: *Arnold v. Nichols*, 64 N. Y. Rep., 117; distinguishing *Merrill v. Green*, 55 id., 270.

See *Goodenow v. Jones*, 75 Ills., 48.

An allegation in such an action, in the answer of the partner, that he was induced to enter into the agreement by the fraud of the original debtor, in the absence of allegations that he has rescinded the agreement on account of the fraud, or has sustained damages by reason thereof, does not authorize evidence of the fraud upon the trial: *Arnold v. Nichols*, 64 N. Y., 117.

See *Heniman v. Bowen*, 3 Hun, 192; *Goodenow v. Jones*, 75 Ills., 48.

A guaranty goes with the principal obligation, and is enforceable by the same persons who can enforce that. H. & O., being partners, H. sold out his interest in the firm property to O., who agreed to pay the firm debts, among them a debt due plaintiffs. Defendant guaranteed the performance of this agreement. Plaintiff's debt not having been paid, H. assigned to them his interest and claim under the agreement and the guaranty. In an action to recover the amount due plaintiffs, held that plaintiffs were entitled to recover either directly on the guaranty, which they could adopt and enforce in their own names, or upon the assignments: *Claffin v. Ostrom*, 54 N. Y., 581.

See 11 Albany L. J., 121, Id., 191.

See *Kelly v. Roberts*, 40 N. Y., 432.

Where, upon the dissolution of a firm, one partner executes to another a bond with a surety conditioned for the payment, by the partner executing it of all the firm debts, the liability of the obligors is to the obligee only, not to the creditors, and an action cannot be maintained thereon, by a firm creditor, to recover his indebtedness of the obligors: *Merrill v. Green*, 55 N. Y., 270, distinguishing *Lawrence v. Fox*, 20 N. Y., 268.

See 11 Albany Law Jour., 191, Id., 121.

Where one purchases lands subject to a mortgage thereon, he is not personally liable to pay the same or any deficiency arising on a foreclosure thereof: 2 Story's Eq. Jur., §§ 1248, *et seq.*; *Collins v. Rowe*, 1 Abb. N. Cas., 97 and note; *Belmont v. Coman*,

22 N. Y., 498; *Dingeldein v. Third*, etc., 37 N. Y., 575; *Gage v. Brewster*, 31 N. Y., 221; *Binsse v. Paige*, 1 Abb. Ct. App. Dec., 138; *Gilbert v. Averill*, 15 Barb., 20; *Stebbins v. Hall*, 29 Barb., 524; *Hartley v. Tatham*, 10 Bosw., 274, affirmed 24 N. Y., 170; *Ford v. David*, 1 Bosw., 570.

See *Ferris v. Crawford*, 2 Den., 595; *Weaver v. Toogood*, 1 Barb., 238; 16 Alb. L. J., 374-5; *Webb v. Rowe*, 35 Mich., 58.

Otherwise where by the terms of the conveyance he assumes the mortgage and agrees to pay the same: 2 Story's Eq. Jur., §§ 1248, *et seq.*; *Burr v. Beers*, 24 N. Y., 178; *Wales v. Sherwood*, 52 How. Prac., 413; *Bentley v. Vanderheyden*, 35 N. Y., 677; *Calvo v. Davies*, 8 Hun, 222, overruling, in part, *Perkins v. Squires*, 1 T. & C., 620; *Drury v. Clark*, 16 How. Prac., 424; *Ford v. David*, 1 Bosw., 570; *Binsse v. Paige*, 1 Abb. Ct. App. Dec., 138 note; *Collins v. Rowe*, 1 Abb. N. Cas., 97 note; *Crawford v. Edwards*, 33 Mich., 354; *Cramer v. Lepper*, 26 Ohio St. R., 59; *Taylor v. Whitmore*, 35 Mich., 97; *Miller v. Thompson*, 34 Mich., 10; *Bock v. Gallagher*, 114 Mass., 28; *Pender v. William*, 26 N. J. Eq., 210; *Hugler v. Atwood*, 26 N. J. Eq., 504, affirmed 28 id., 275; *Foster v. Atwater*, 43 Conn., 245; *Thompson v. Wilkes*, 5 Grant's (U. C.) Chy., 594.

See *Dingeldein v. Third*, etc., 37 N. Y., 575; *Burch v. Burch*, 52 Ind., 136; *Bentley v. Vanderheyden*, 35 N. Y., 677; *Mellin v. Whipple*, 1 Gray, 317, 322; 16 Alb. Law Jour., 374-5; *Webb v. Rowe*, 35 Mich., 58.

Where the grantees of the equity of redemption in mortgaged premises, who was neither legally nor equitably interested in the payment of the bond and mortgage, except so far as the same was a charge upon his interest in the premises, conveyed the mortgaged premises subject to the mortgage, and the conveyance recited that the grantees therein assumed the payment of the mortgage, and were to pay off the same as a part of the consideration of such conveyance:

Held, that as the grantor in that conveyance was not personally liable to the holder of the mortgage to pay the same, the grantees were not liable to the holder of such mortgage for the

deficiency, upon a foreclosure and sale of the mortgaged premises.

Held, also, that if the grantor in the conveyance had been personally liable to the holder of the mortgage for the payment of the mortgage debt, the holder of such mortgage would in equity have been entitled to the benefit of the agreement recited in such conveyance to pay off the mortgage; and would, in that case, have been entitled to a decree over against such grantees for the deficiency: *King v. Whitney*, 10 Paige, 465.

The owner of premises executed a mortgage on the same, and thereafter conveyed them to a grantee who did not assume the payment thereof. Through several mesne conveyances, the grantees in none of which assumed the payment of the mortgage, the property was conveyed to defendant. In the deed to defendant was a clause whereby she assumed payment of the mortgage. Held, that the holder of the mortgage was not entitled to the benefit of defendant's agreement, and she was not liable for a deficiency upon a sale under the foreclosure of the mortgage: *Vrooman v. Turner*, 15 Albany Law Jour., 454, 4 Week. Dig., 504, Court Appeals.

A promise made by one person for a valuable consideration, paid by another, to pay the debts of the latter, is in legal effect a promise to pay creditors who are such at the time the promise is made. They acquire thereby additional security for the payment of their debts, which will pass as an incident on assignment of one of the debts secured, but the assignee takes it by a derivative title from the assignor, and no direct contract is created by the assignment between him and the promisor: *Barlow v. Myers*, 64 N. Y., 41, reversing 3 Hun, 720.

It is immaterial that the debts are upon negotiable instruments not due. In the absence of special words indicating such an intent, the promise is not to the persons holding the instruments at their maturity; and the interest of the assignee in the promise is subject to any equities on the part of the promisor existing against the debt while in the hands of the assignor: *Barlow v. Myers*, 64 N. Y., 41, reversing 3 Hun, 720.

Where, therefore, defendant in consideration of the transfer to her of the property of the firm of R. & W., promised to pay the debts of the firm, among which were certain promissory notes not due, then held by N. R., who before maturity assigned them to plaintiff, in an action upon the promise, held, that defendant could set off a claim held by her against N. R.: *Barlow v. Myers*, 64 N. Y., 41, reversing 3 Hun, 720.

Where one of two partners, being indebted to the firm, gives his note to the other for his proportion of the debt, it is, in effect, a division of so much of the firm property; the individual property of the partner making it, and as such is a proper counter claim or set-off, in an action upon a bond executed upon dissolution of the firm by the payee of the note to the maker, conditioned for the payment of the partnership debts: *Merrill v. Nichols*, 55 N. Y., 270.

Quere. Whether the instrument being under seal makes any difference in the application of the rule.

That it does: *Crowell v. Currier*, 27 N. J. Eq., 152, affirmed *Id.*, 650.

That it does not: *McDowell v. Laer*, 35 Wisc., 171.

Where land is conveyed subject to a usurious mortgage, which the grantee assumes to pay, the mortgagee acquires a right to an appropriation of the land for that purpose, which cannot be divested without his assent. Held, accordingly, that a subsequent arrangement between the parties to the deed, whereby, as between them, it became a mere quit-claim, was inoperative to open the defence of usury to the grantee. Query, however, whether the personal liability assumed by the grantee is not discharged by the release of his grantor. So held in the Supreme Court, but not passed upon by the Court of Appeals: *Hartley v. Harrison*, 24 N. Y., 170; see 8 Pars. on Con., 122; *Stephens v. Cosbacker*, 8 Hun, 116; *Garnsey v. Rogers*, 47 N. Y., 242; *Simson v. Brown*, 6 Hun, 251; 16 Alb. L. J., 374-5.

The principle that if one person makes a promise to another, for the benefit of a third party, that third person may maintain an action on it, applies to simple contracts, not to contracts under seal.

In ordinary cases, a mortgagee does not, by force of a contract of assumption of the mortgage, acquire a right of action against a purchaser of the mortgaged premises, but the benefit flowing to him from the contract is limited to a right to be subrogated to the rights of the debtor. He stands in his debtor's rights, and may appropriate to the satisfaction of his mortgage any security held by his debtor for its payment; he can, therefore, only have a personal judgment against the purchaser for his debt, when the mortgagor holds an obligation which will support such judgment: *Crowell v. Currier*, 27 N. J. Eq., 152, affirmed *Id.*, 650.

See 15 Alb. L. J., 278; 16 Alb. L. J., 374-5.

Where parties have made a contract which will, either directly or indirectly, benefit a mere stranger, they may, at their pleasure, abandon it, and mutually release each other from its performance, regardless of his interest, unless the parties, with knowledge that he is relying on the contract, suffer him to put himself in a position from which he cannot retreat without loss in case the contract is not performed; then he may ask to have the contract performed, so far as it touches his interests: *Crowell v. Currier*, 27 N. J. Eq., 152, affirmed *Id.*, 650.

See 15 Alb. L. J., 278; 16 Alb. L. J., 374-5.

A holder of a mortgage is not entitled to a decree for a deficiency against a purchaser of the mortgaged premises, by virtue of his contract of assumption of the mortgage, where, before the mortgage fell due, the purchaser reconveyed to the mortgagor, who, by his deed, assumed the mortgage; the holder of the mortgage having become the owner of it before the covenant of assumption, without reliance upon it as part of his security, and his conduct not appearing to have been in the slightest degree influenced by it: *Crowell v. Currier*, 27 N. J. Eq., 152, affirmed *Id.*, 650; *Stephens v. Casbacker*, 8 Hun, 116.

See *Putney v. Farnham*, 27 Wisc., 187; 15 Alb. L. J., 278; 16 Alb. L. J., 374-5.

Defendant, for a consideration moving from one Parr, the owner of lands,

orally agreed to pay certain mortgages upon the lands held by a savings bank. Subsequently Parr conveyed the lands to plaintiff with a covenant of warranty. Held, that plaintiff was a stranger to the consideration for the promise of defendant, and could not enforce it against him. Under the agreement the bank could enforce the defendant's promise, and Parr also could enforce it upon payment to the bank, and perhaps before. This right could not pass to plaintiff by conveyance as annexed to the land: *Miller v. Winchell*, 16 Alb. L. J., 223, 5 Weekl. Dig., 212, N. Y. Court Appeals. See 16 Alb. L. J., 374-5.

Where there were two joint makers of a promissory note held by the plaintiff and one, in consideration of a demise of premises to him by the other, in and by the lease agreed to pay the note in part payment of the rent, and afterwards transferred the lease and his right to the demised premises to the defendant who entered into possession: Held, that the holder of the note could not sustain an action against the assignee for its amount.

The agreement of the lessee to pay the note did not run with the estate in the land, and therefore did not bind his assignee.

The plaintiff not being the grantee of the reversion of the demised premises or of the rent reserved could maintain no action against the assignee of the lease. There was no privity of contract or estate between them: *Dolph v. White*, 12 N. Y., 296.

See *Ford v. David*, 1 Bosw., 569.

S. assigned to M. a contract for the sale of land, for which M. gave his two promissory notes for \$50 each, dated July 8, 1857, payable one year from date with interest. The notes were signed by H., the plaintiff, as surety for M. On the 18th of November, 1857, M. assigned the same contract to the defendant, who made an agreement with M., in part consideration thereof, to pay the notes which had been given to S. by the latter. H. having paid the notes brought an action against the defendant to recover the amount so paid: Held, that although, under the facts of the case, the agreement of the defendant to pay the notes was a valid one, yet that there

was no privity between him and the plaintiff which would sustain an action by the latter: Held, also, that the only rights H. had were the rights of a surety for M., and that as such his action must be brought against M.: *Hoffman v. Schwabe*, 33 Barb., 194.

Although a deed is *inter partes*, a covenant therein made with a third person may be enforced by such third person by suit, if it clearly appears by the instrument that it was the intention to confer such right.

The mere presence, in such deed, of a covenant with a third person, will not, as has been held by many cases, be evincive, by its own force, of such intention: *National Bank v. Segur*, 39 N. J. Law, 173.

A stipulation in a mortgage, whereby the mortgagee assumes and agrees to pay a prior mortgage on the premises, does not impose upon the mortgagee a personal liability for the prior mortgage debt, which can be enforced against him by the prior mortgagee.

The same rule applies to a deed absolute on its face, but, in fact, intended as a mortgage.

The stipulation in such cases is not a promise made by the mortgagee to the mortgagor for the benefit of the prior mortgagee, but is a promise for the benefit of the mortgagor only: it is to protect his property by advancing money to pay his debt. The cases of *Burr v. Beers* (24 N. Y., 178), and *Lawrence v. Fox* (20 N. Y., 268), distinguished.

In this respect it differs from a similar stipulation contained in an absolute conveyance.

When the mortgage containing the stipulation is cancelled and the mortgaged premises are restored to the mortgagor, the stipulation is, as between the parties to it, extinguished: *Garnsey v. Rogers*, 47 N. Y., 233.

See 15 Alb. L. J., 278; *Campbell v. Smith*, 8 Hun, 6.

There is no privity between the party originally insured and the re-insurer; the liability over of the re-insurer is solely to the re-insured: *Strong v. Phoenix Ins. Co.*, 62 Mo., 280.

So one to whom a check is given cannot sue the drawee thereon until acceptance. And payment upon a forged indorsement is not such an acceptance as will entitle him to main-

tain an action upon the instrument as accepted: First, etc., *v. Whitman*, 94 U. S. Rep., 343; S. P., *Matter of Continental, etc.*, 5 N. Y., Weekly Dig., 461, reversing 10 Hun, 604.

B. having agreed to make a wagon for M., the latter gave to L. a written order upon B. for such wagon, which order B. accepted and handed back to L. The wagon was afterwards delivered to L. by B. upon the order. Held, that this was an equitable assignment of the wagon to L., and that B. could not recede from the undertaking and maintain an action against L. for the price of the wagon: *Barber v. Lyon*, 22 Barb., 622.

In case of a *mere* agency for the transmission of money, the party for whom the money was designed cannot maintain an action against the agent for money had and received to his use. To sustain an action there must be an express promise by the agent.

Where C., a debtor of B., handed to the defendant a sum of money and requested him to deliver it to B. and have the latter give C. credit for it, and the defendant took the money and promised to do so: Held, that no action would lie in favor of B.'s administrator, against the defendant, for money had and received: *Bigelow v. Davis*, 16 Barb., 561; *Mellin v. Whipple*, 1 Gray, 317, 320-4; *Seaman v. Whitney*, 24 Wend., 260.

But if an authority to a bailee to pay be not revoked by the bailor, and where it is not in effect a suit against an agent, as such, see *McKay v. Draper*, 27 N. Y., 256; *Aubrey v. Fisk*, 36 N. Y., 48; *Merritt v. Millard*, 10 Bosw., 310, 3 Abb. Court App. Dec., 291; *Murdock v. Aikin*, 29 Barb., 59, 66.

Thus far we have considered the liability of the person making the new promise to a suit thereon in the name of him to whom he promised to make such payment.

The question frequently arises as to when the original promisor or debtor is *discharged* from his liability thereon.

Novation may be defined to be a transaction, whereby a debtor is *discharged* from his liability to his original creditor by contracting a new obligation in favor of a new creditor, by the order of his original creditor: 1 *Parsons on Cont.* (6th ed.), 217-222; 1 *Throop's Verbal Agreements*, §§ 321-357.

Novation: In the civil law there are three kinds of novation. 1. Where the debtor and creditor remain the same, but a new debt takes the place of the old one; 2. Where the debt remains the same, but a new debtor is substituted; and, 3. Where the debt and debtor remain, but a new creditor is substituted.

Same, delegation: Delegation is, where a debtor obtains a release from his creditor by the substitution and acceptance of another who obliges himself to the creditor. Domat, 910, secs. 2318, 2319.

Same at common law: Novation at common law is mainly the same as in the civil law: 8 T. R., 180.

Consideration: There must always be an old debt extinguished as a consideration for the new one: Adams v. Power, 48 Miss., 450; McCafferty v. Decker, 5 N. Y. Weekly Dig., 379.

In case debts are not *created* by the transaction, but already exist, the original liability of the party sought to be sued on the new agreement must be *extinguished and discharged*. If not, there is no consideration for the new promise, and no action can be maintained upon it by the party who seeks to recover on such new promise: 1 Pars. on Cont. (6th ed.), 219; Ford v. Adams, 2 Barb., 349; Blunt v. Boyd, 3 Barb., 209. The head-note of this case is wrong; the case holds the *reverse* of the head-note: Same case, 6 N. Y. Legal Obs., 361; Van Epps v. McGill, Lalor's Sup., 109; Stoddard v. Graham, 23 How. Pr. Rep., 532; Fay v. Jones, 18 Barb., 340; Commercial, etc., v. Norton, 1 Hill, 501; Kelly v. Roberts, 40 N. Y., 432; State, etc., v. Mettler, 2 Bosw., 392, 398; McCafferty v. Decker, 5 N. Y. Weekly

Dig., 579; Anderson v. Whitehead etc., 55 Geo., 277.

See Wheeler v. Bailey, 13 Johns., 366.

A promise by a debtor to pay the amount of his debt to a creditor of the one he owes, by which he becomes *discharged* of his obligation by mutual agreement of all the parties, is not a promise to discharge the debt of another within the meaning of the statute of frauds, but is simply a new agreement, resting upon a sufficient consideration, to pay his own debt: Lester v. Bowman, 39 Iowa, 611; Chamberlain v. Ingalls, 38 Iowa, 300; Anderson v. Whitehead, 55 Geo., 277.

B. owed J., and J. owed L. The three met and mutually agreed that B. should pay to L. the amount he owed to J., and that this payment should be accepted *pro tanto* by L. in discharge of J.'s indebtedness, and by J., in satisfaction of B.'s. It was held in an action by L. against B. that J.'s debt was discharged and that B. became liable to L.: Lester v. Bowman, 39 Iowa, 611.

A person depositing money with bankers and taking their accountable receipt, does not, by continuing to leave his money in the bank after a dissolution of the original firm and the constitution of a new one, which consists of some of the members of the old bank and of other persons, discharge the former partners who have gone out, although he receives interest regularly from the new firm, gives them no notice, and continues to transact business with them in the common course, and that for a period of four years, and until they become insolvent: Gough v. Davies, 4 Price, 200.

See also Port Whitby, etc., v. Damble, 32 U. C. Q. B., 36.

[3 Chancery Division, 27.]

V.C.H., Jan. 19: C.A., April 26, 28; May 6, 1876.

*MELUISE V. MILTON.

[27]

[1874 M. 155.]

Will of Personal Estate—Fraud—Exclusive Jurisdiction of Court of Probate.

A testator made a will giving all his property to his wife, and appointing her sole executrix. She proved the will. The heir-at-law and sole next of kin filed a bill to have her declared a trustee of the property for him, on the ground that she had fraudulently concealed from the testator the fact that she was not his lawful wife, as she had a former husband living:

Held, that the Court of Chancery had no jurisdiction to entertain the case, which was within the exclusive jurisdiction of the Court of Probate; and that the case was not distinguished from *Allen v. M'Pherson* (1) by the fact that the lady had not asked the testator to make a will in her favor.

THIS was an appeal by the plaintiff from a decision of Vice-Chancellor Hall, who had dismissed the bill with costs.

On the 23d of January, 1850, the defendant Maria Milton, *then Maria Dunster, spinster, intermarried with the [28 defendant John Milton. On the 10th of September, 1854, after having lived for many years separate from her husband, she went through the ceremony of marriage with F. E. Edwards, with whom she lived as his wife till his death in September, 1864, after which she, on the 30th of May, 1870, went through the ceremony of marriage with Henry Meluish, a friend of Edwards, who had known her as Mrs. Edwards.

H. Meluish, on the 23d of August, 1870, made his will, by which he gave all his property, real and personal, to the defendant Maria Milton, by the description of his dear wife Maria Chapple Meluish, and appointed her his executrix. He died on the 4th of June, 1871, possessed only of personal estate, and on the 26th of June, 1871, she proved the will.

The bill was filed by William Meluish, the sole next of kin and heir-at-law of the testator, alleging that Maria Milton, at the time when she went through the ceremony of marriage with the testator, knew that John Milton was living; that the testator was not aware of it; that she fraudulently concealed it from him, and induced him to believe, and he did believe, that she was his lawful wife. The bill alleged that the dispositions of the will in her favor were obtained by the fraudulent assumption on her part of the character of the testator's wife; and it prayed that the de-

(1) 1 H. L. C., 191.

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vise and bequest to her might be declared void in equity, and that she might be declared a trustee for the plaintiff of the real and personal estate.

It did not appear that Maria Milton ever took any means to induce the testator to make a will in her favor, nor that she even knew of the will till after his death. In opposition to the case made by the bill, she made the case that the testator when he married her was fully aware of her having been married to Milton, and of his having been alive long after she separated from him, and knew that there was no proof of his death.

The case came on for hearing before Vice-Chancellor Hall on the 19th of January, 1876.

Dickinson, Q.C., and *B. B. Rogers*, for the plaintiff.

Ince, Q.C., and *A. Whitaker*, for the defendants.

29] **[Kennell v. Abbott* ⁽¹⁾, *Rishton v. Cobb* ⁽²⁾, *Segrave v. Kirwan* ⁽³⁾, *Re Pelts* ⁽⁴⁾, *Wilkinson v. Joughin* ⁽⁵⁾, and *Allen v. M'Pherson* ⁽⁶⁾], were referred to.]

HALL, V.C.: The question here is whether, upon the circumstances of this case, the devisee and legatee under the will of the testator Meluish, whereby he gives all his property to his dear wife, Maria Chapple Meluish, absolutely, and appoints her sole executrix, is disentitled in this court to claim the benefit of that disposition, by reason of her having, as is alleged, concealed from her intended husband that which she ought to have communicated to him. The law to be applied to cases of this description is stated by Lord Alvanley in *Kennell v. Abbott*, which was adopted and referred to in the case of *Rishton v. Cobb* ⁽²⁾, in which Lord Cottenham says: "When a legacy is given to a person, under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy." Afterwards he said that, before applying this rule, the court must be satisfied that the assumed character was the motive for the bounty. It was considered in *Kennell v. Abbott* to be quite clear that a fraud had been committed, and the like observation applies to *Wilkinson v. Joughin*. We must attend in all these cases to the circumstances of the particular case. Now, in this case, I think it impossible for the court not to conclude upon the evidence that the question of this lady

⁽¹⁾ 4 Ves., 802.

⁽²⁾ 5 My. & Cr., 145.

⁽³⁾ 1 Beatt., 157.

⁽⁴⁾ 27 Beav., 576.

⁽⁵⁾ Law Rep., 2 Eq., 319.

⁽⁶⁾ 1 H. L. C., 191.

⁽⁷⁾ 5 My. & Cr., 150.

being or not being a married woman was, previously to the ceremony of marriage being gone through between her and Meluish, matter of consideration and discussion between them. She had been living for a number of years as the wife of a friend of Meluish, and he had known her in that character; he desired to marry her, and the question whether Milton was still living was discussed. The statements made in reference to that in the answers of the defendant, Mrs. Milton, certainly *have shifted, and her [30 evidence in some respects is inconsistent with the statements in those answers. In her first answer she said that she had not heard or seen anything of him for nineteen years. The bill was then amended, and a particular date was fixed for her having seen Milton, and it was charged that she saw Milton on other occasions, but the result of the evidence is, I think, certainly that only one interview was proved to have taken place, and that in 1866; and my conclusion on the evidence is that Meluish, before the marriage, was informed that Milton had been seen after the death of Edwards. In that state of things the testator married this lady. Whether she told him she had not seen Milton since 1862, or whether she told him that she had not seen him except on one occasion, which was after the death of Edwards, is not very material; he chose to marry a lady who undoubtedly had been married to another man of whose death he was aware that there was no certain evidence. Assuming that he was told that the last time when Milton had been heard of was in the year 1862, the testator still must have gone through the marriage ceremony with the knowledge that it was not certain whether the first husband was living or dead, and when, after this, the parties had lived together as man and wife for some time, I do not think it would be safe to consider that the character of lawful wife was the motive, and, as Lord Cottenham says, the only motive, for the gift. A man who under these circumstances was living with a woman as his wife might very well intend that the property should go to her, although she in fact might turn out not to be his lawful wife. I cannot consider that in that state of circumstances the case is brought within the case of *Kennell v. Abbott* (*). It seems to me, therefore, that the fraud is not established so as that I can, upon this bill, declare the defendants trustees of anything for the plaintiff. I have therefore said nothing whatever as to the jurisdiction which has been assumed by this court in the four cases which have been referred to. Three out of the

(*) 4 Ves., 802.

four were before *Allen v. M'Pherson* (¹), and that case was not cited in the fourth, so that the matter was not discussed. I give no opinion as to whether there would be jurisdiction in this case, or whether the case is covered by *Allen v. 31] M'Pherson*, but, assuming that I have *jurisdiction, I hold that the plaintiff has failed to establish his case, and that therefore the bill must be dismissed, and dismissed with costs.

The plaintiff appealed from this decision. The appeal came on to be heard on the 26th of April, 1876.

Dickinson, Q.C., and *B. B. Rogers*, for the appellant: We contend that the case is governed by *Kennell v. Abbott* (²), and that the Vice-Chancellor has taken an erroneous view of the evidence in holding it to establish that the testator went through the ceremony of marriage with Mrs. Milton knowing that there was a doubt whether she was not the wife of another man. As regards the jurisdiction, the case is distinguishable from *Allen v. M'Pherson* (¹). We are not seeking to affect the legal estate, but only the beneficial interest. The court ought not to disclaim jurisdiction unless it is clear that the Probate Court has it. Now, the only fraud which appears to be cognizable in the Probate Court is fraud in obtaining the will: *Williams on Executors* (³). Here there was no such fraud. Mrs. Milton did not persuade the testator to make the will—she never even knew of it. He went to his legal adviser and had it prepared without consulting her. How, then, is the Court of Probate to say that it is not his will?

[JAMES, L.J.: If the bequest was not obtained by fraud, where is your equity?]

On an implied condition that the legatee was his legal wife.

[JAMES, L.J.: According to that, it would make no difference if the lady was innocent, and married in the reasonable but mistaken belief that she was a widow, and if the testator knew all the circumstances.]

At all events, it does not appear that the Court of Probate can take cognizance of any fraud but a fraud in obtaining the instrument.

[JAMES, L.J.: If the instrument is a fruit of fraud, it was obtained by fraud.]

32] **Segrave v. Kirwan* (⁴) supports our case.

[JAMES, L.J.: There the fraud did not affect the appointment of the executor.]

(¹) 1 H. L. C., 191.

(²) 4 Ves., 802.

(³) Part i, Book vi, chap. i.

(⁴) 1 Beatt., 157.

Lord Cottenham's remarks in *Rishton v. Cobb* ⁽¹⁾ are in our favor.

[MELLISH, L.J., referred to the statement of Gilbert, C.B., cited in *Allen v. M'Pherson* ⁽²⁾.]

THEIR LORDSHIPS expressed themselves not satisfied as to the result of the evidence, but ordered the case to stand over, that they might consider whether Ince, Q.C., and A. Whitaker, for the respondents, would be called upon as to the question of jurisdiction.

May 6. JAMES, L.J.: The plaintiff in this case is the next of kin of the testator, Mr. Meluish. The defendant is a lady who has propounded in the Probate Court and obtained probate of an instrument whereby Mr. Meluish left all his property, real and personal, to her, describing her as his dear wife, and appointed her his sole executrix. The plaintiff alleges that she not only was not the lawful wife of Mr. Meluish, but that she well knew at the time when she went through the ceremony of marriage with Edwards that her husband, the defendant Milton, was still living, and that she also well knew him to be living when, under the name of Maria Chapple Edwards, she went through the ceremony of marriage with Mr. Meluish; that neither at the time of the marriage nor afterwards was Mr. Meluish aware of her having a husband living; that she fraudulently concealed the fact from him, and then, having fraudulently induced him to regard her as his lawful wife, obtained this will; and the prayer is that the devise and bequest to her may be declared void in equity, and that she may be declared a trustee for the plaintiff. The Vice-Chancellor came to the conclusion that the plaintiff had failed to prove his allegations. The defendant has taken a preliminary objection that the Court of Chancery had *no jurisdiction to [33 entertain such a suit. No doubt, until the decision in *Allen v. M'Pherson* ⁽²⁾, a good deal might have been said, and was said, and even decided in favor of the jurisdiction of the Court of Chancery to entertain such a suit and to relieve against such a fraud, and in that very case two eminent judges of the Court of Chancery maintained that jurisdiction. But their eloquence and learning did not prevail with the House of Lords, which came to the conclusion that in such a case jurisdiction was to be exercised exclusively by the Court of Probate. That case was in many respects the same as this; but there is a distinction between them which

⁽¹⁾ 5 My. & Cr., 145.

⁽²⁾ 1 H. L. C., 191.

is not in favor of the jurisdiction of the Court of Chancery in the present case. In *Allen v. M'Pherson* the instrument complained of was a codicil by which the testator revoked beneficial interests given by his will, without in any way affecting the legal title of the executor. Here the alleged fraud, if it affects anything, affects the whole will, including the title of the executrix. In that case the codicil was alleged to have been obtained by fraudulent misrepresentations, and as the case came before the court on demurrer, these allegations were to be taken as true, yet the House of Lords held that the Court of Probate alone had jurisdiction. The doctrine laid down was in substance this: "A will obtained by fraud is not the will of the testator. A probate which is not recalled is conclusive proof in all other courts that the will is his will. Therefore no other court can listen to the allegation that the will was obtained by fraud." We are bound by that decision, and are bound to give full effect to it. I cannot see any distinction between that case and the present. There the case made was that a codicil had been obtained by fraudulent misrepresentations; here, that the whole will has been so obtained. A distinction was attempted to be made on the ground that the lady had not asked for the will, and that the fraud consisted only in inducing the testator to believe in her *status* as his wife; but it appears to me that this argument cannot be sustained. Either the fraud was *causa causans* of the will, or it was not. If it was, then the will was obtained by fraud, and the case is within the exclusive jurisdiction of the Court of Probate; if it was not, then no ground is laid for the interference of any court. *We therefore dismiss the appeal on the ground that the Court of Chancery had no jurisdiction to entertain the case; the dismissal being without prejudice to any proceedings in the Probate Division. We give no opinion as to the result of the evidence, as the court had no jurisdiction to entertain the question.

MELLISH, L.J.: I am of the same opinion. The case of *Allen v. M'Pherson* (*) clearly decided that the Ecclesiastical Court had exclusive jurisdiction to set aside the whole or any part of a will of personal estate on the ground of fraud, and whatever respect we entertain for the opinions of the two eminent judges who dissented, we must look to the decision of the majority. Lord Campbell there observed that the Court of Chancery had no jurisdiction over wills of personal property, and could not set aside a probate of personal property: if, then, a bill could be filed to make

(*) 1 H. L. C., 191.

the legatee a trustee for another person on the ground of fraud, that would be done indirectly which the law does not allow to be done directly. Is not this in substance a bill to set aside a probate for fraud? There are two facts which the plaintiff must prove: first, that this lady fraudulently concealed from the testator the fact that she had a husband living; and, secondly, that he made his will in the faith that he was legally her husband. If those facts are proved, then it is proved that the will was obtained by fraud. If it was not obtained by fraud, there is no ground for interfering with it. The only ground to be alleged for the jurisdiction is this, that there may be a difference between what the Court of Probate considers fraud and what the Court of Chancery considers fraud. It would be a mischievous thing to hold that there is such a difference, unless the authorities compel us to do so, and I cannot find from the cases that any such difference exists. Then it was urged that the Court of Probate could not refuse probate for fraud, unless the fraud was committed for the purpose of obtaining the will; and no doubt in *Allen v. M'Pherson* the fraud was of that nature, the residuary legatee, knowing himself to be such, having made fraudulent representations for the purpose of getting legacies revoked. Here it is said that the fraud was not committed for the *purpose of obtaining the will. I cannot agree in this. Though we term the conduct alleged in this case fraudulent concealment, it is equivalent to fraudulent misrepresentation. When the lady went through the ceremony of marriage with the testator, she in effect represented to him that she was capable of becoming his lawful wife, and every day while they were living together she must be taken as continuously representing to him that she was his lawful wife. If at the same time she knew that her former husband was alive, this was what the court would take notice of as a fraudulent misrepresentation. For what purpose were these representations made? To obtain all the benefits of the position of the testator's lawful wife, and a testamentary provision in case she survives her husband, is one of the advantages which a wife most naturally expects. The misrepresentations must, therefore, be treated as made, among other things, for the purpose of obtaining a will in her favor, and it makes no difference whether this particular advantage was actually present to her mind or not. This, therefore, is a suit to set aside a will as having been obtained by fraud, and I am of opinion that there is no difference between the Court of Chancery and the Court of Probate

as to what constitutes fraud. We, therefore, must decide this case on the ground that the Court of Chancery had no jurisdiction, and we ought not to give any opinion as to the effect of the evidence; indeed I think that we ought to have heard the case out on the question of jurisdiction before we heard any of the evidence, for our giving an opinion on the merits might prejudice the case on its coming before the proper tribunal. At the time when *Allen v. M'Pherson* ⁽¹⁾ was decided much weight might have been given to the argument that the Court of Chancery had better means of inquiring into fraud than the Court of Probate; but that is not so now, for the Probate Division has the same means of arriving at the truth as the Chancery Division. I think, therefore, that now convenience is in favor of the law as laid down in *Allen v. M'Pherson*, for there is no convenience in allowing parties to keep back a defence which they might urge in the Court of Probate and then raise it elsewhere, and still less is it desirable to enable them to try the same matter twice over in different courts.

36] *BAGGALLAY, J.A.: I agree with the judgments of the Lords Justices. Whether the Vice-Chancellor came to a correct conclusion on the facts, I give no opinion. The case may have to be tried in another court, and ought to go there without being prejudiced by anything that is said here. The decision in *Allen v. M'Pherson* ⁽¹⁾ is binding on us, and I think that the exclusive jurisdiction of the Court of Probate in such cases is supported by convenience as well as by authority.

Solicitors: *Prior, Bigg, Church & Adams; E. Doyle.*

⁽¹⁾ 1 H. L. C., 191.

See 12 Eng. Rep., 103 note; *ante*, 548 note; 4 Eng. Rep., 710 note.

[3 Chancery Division, 36.]

V.C.H., March 17: C.A., May 28, 1876.

PILE V. PILE.

[1878 P. 185.]

Ex parte LAMBTON.

Compensation under Lands Clauses Act—Mortgagor and Mortgagee—Compensation for Loss of Profits—Good-will.

The owner of business premises mortgaged them with the machinery and fixtures. A railway company gave notice to take part of the premises for their railway, but before the price was fixed the mortgagor died, and the mortgagees entered into possession of the property. A suit was instituted for the administration of the mortgagor's estate, which proved to be insolvent, and a receiver was appointed, who, with

the consent of the mortgagees, carried on the business. Arbitrators and an umpire were appointed to fix the compensation money payable by the company. The umpire awarded a sum of £11,950, of which he certified that he had awarded £2,800 in respect of the loss of profits in carrying on the business. The executors claimed the £2,800 as belonging to the mortgagor's estate, to be divided among his general creditors:

Held (affirming the decision of Hall, V.C.), that the £2,800 was in the nature of compensation for the value of the good-will of the business, which passed with the premises; and that the whole of the sum of £11,950 belonged to the mortgagees.

THE question in this case arose in a suit for the administration of the estate of William Pile.

On the 3d of November, 1869, Sir W. Williams demised to William Pile a ship and graving dock, and premises, at Monkwearmouth, in the county of Durham, for twenty-one years, at the *rent of £340. By an indenture of mort- [37
gage, dated the 7th of November, 1872, W. Pile assigned to Messrs. Lambton & Co., bankers at Sunderland, among other things, all the hereditaments and premises comprised in the lease, and also all buildings, engines, machinery, implements, utensils, fixtures, real or personal property which might be erected or placed on the premises during the continuance of the security, either in lieu of or in addition to those then existing thereon, for securing the repayment of £40,000, or the balance of his account not exceeding £80,000, with interest. The mortgage contained powers of entry and of sale in case of default in payment of the mortgage debt or interest. On the 27th of January, 1873, the North Eastern Railway Company gave notice to W. Pile to purchase the graving dock and certain buildings thereon, being part of the premises comprised in the lease. On the 12th of February, 1873, W. Pile gave notice to the company that he claimed £35,000 for the purchase of his interest in the premises, and that if they refused to pay him that sum, he required the amount of compensation to be settled by arbitration.

W. Pile died on the 5th of June, 1873, having appointed the defendants his executors.

A few days after the death of W. Pile, Messrs. Lambton & Co. took possession of the graving dock and premises, under the provision in their mortgage deed, and on the 11th of June they gave notice to the railway company that they were mortgagees in possession of the premises, and desired to have the amount of their compensation settled by arbitration.

A suit was instituted by some of the persons beneficially interested under W. Pile's will for the administration of his estate, and on the 31st of July, 1873, the usual decree for administration was made. The executors were not able to

carry on the testator's business, having no funds for that purpose, but, with the consent of the mortgagees, a receiver was appointed, and the premises were let to persons who completed the contracts which W. Pile had at the time of his death.

By an appointment in writing, dated the 30th of March, 1873, the company nominated an arbitrator to act on their behalf, and the executors and the mortgagees, by the same instrument, concurred in recommending another arbitrator on 38] their behalf "to settle *the amount of the compensation to be paid for the said lands so required as aforesaid, and for the damage which might be sustained by reason of severance, or by reason of the execution of the works, or of the exercise, as regarded such lands, of the powers vested in the said company by their said act."

The two arbitrators appointed an umpire, to whom the matter was ultimately referred. He made his award, dated the 1st of September, 1874, and thereby awarded that the compensation to be paid by the said company to the executors and Messrs. Lambton & Co. "for the leasehold interest of the parties in the said lands and hereditaments so required as aforesaid, and for the damage that might be sustained by them by reason of the execution of the works for which the said lands and hereditaments were so required as aforesaid, or of the exercise, as regarded such lands and hereditaments, of the powers vested in the said company by the said acts, and for the trade-profits of the executors, and for the machinery on the said lands and hereditaments, should be the sum of £11,950, which should be due and payable from the said 5th of September, 1875."

The sum of £11,950 was accordingly paid into court by the company, and the premises were assigned to them.

The umpire subsequently, at the request of the parties, gave a certificate as follows: "The question of trade-profits was argued before me, and their annual amount was finally agreed between the parties, and put before me as an item to form part of the total amount awarded, and such item was therefore specially named by me in my award. It was placed by me at £2,800, and was given in respect of the trade profits which would have accrued if the premises had not been taken by the North Eastern Railway Company."

Messrs. Lambton, to whom upwards of £50,000 was due for principal and interest, now presented their petition, claiming that the whole of the compensation money should be paid to them in part payment of their debt.

Hastings, Q.C., and *Oswald*, for the petitioners, referred

to *Chissum v. Dewes* (¹) and *In re Harper and Great Eastern Railway Company* (²).

**Eddis*, Q.C., and *T. Stevens*, for the plaintiffs, [39 contended that the sum of £2,800 belonged to the creditors, as part of the estate of the mortgagor, and was divisible among the general body of the creditors.

Dickinson, Q.C., and *J. T. Humphry*, for the executors.

HALL, V.C.: I am of opinion that the sum of £2,800 must be considered as belonging to the mortgagees, and not to the executors. The sum in question is part of a large sum awarded to be payable under the following circumstances: The late Mr. Pile was lessee of certain premises for twenty-one years. This lease included the machinery, fixed and movable. The railway company gave notice to take part of the premises which were in the lease. The usual proceedings took place. - Mr. Pile made a claim for compensation in respect of his interest in the premises, that is, what was included in the notice. Mr. Pile having died, the proceedings were carried on; arbitrators were appointed on either side, and an umpire. All that had reference, *prima facie*, to what the notice was given for, and what was included in the claim and in the appointment of the arbitrators and the umpire. Before the arbitrators and the umpire they seem to have included, at all events, the machinery; possibly, as to that part which was unfixed, there might have been some question whether it was intended to be included in the arbitration and award. However, all parties seem to have acquiesced that the movable machinery should be taken as included. Then that being so, all that unquestionably belonged to the mortgagees. The question is, whether the sum awarded for trade-profits also belongs to the mortgagees. Supposing for a moment there was no difficulty arising from the fact of this property being only part of the property in the mortgage, it would seem to me that I could not distinguish this case from the case of *Chissum v. Dewes* (¹). The mortgage of the lease of a property of this description must carry along with it everything which would be awarded in respect of that property. Supposing it had not been taken by the company at all, and supposing the mortgagees had come to realize their security, and had had it sold under a decree of [40 this court, and had sold the thing as a whole, would not that have carried along with it any sum which might be considered properly payable by the purchaser in respect of his being able to say that he was carrying on the business

(¹) 5 Russ., 29.

(²) Law Rep., 20 Eq., 39.

upon those premises? Mr. Pile having died cannot, at all events, make that worse; it may possibly make it somewhat better, because Mr. Pile individually would not be in competition with any purchaser, and there would be nothing to sell in respect of the good-will independently of the premises themselves, but anything, which could be called good-will on the sale by the executors must have gone along with the premises. Then if that be so, if the whole were sold, is it any the less the right of the mortgagees, by reason of part of the property being sold, to claim the value of the good-will? Certainly not. They are entitled to that which represents trade-profits ascertained. With reference to that part being taken, we learn from the umpire that the amount of the annual sum in respect of the trade-profits was agreed upon between the counsel, and he, having the means of estimating the sum to be paid in respect of trade-profits, awarded £2,800 in respect of it. How many years' purchase that represents, or whether it represents more than one year's purchase, we do not know, and it is quite immaterial. Suffice it to say, that was one of the things which he calculated as being within his province as arbitrator in respect of the sale of these particular portions of the premises. That seems to me, therefore, to belong to the mortgagees, and I cannot consider that the mortgagees' rights have been in any way prejudiced or affected under the circumstances by reason of there having been a receiver and manager appointed in this suit with the consent of the mortgagees. That was to be taken to be entirely without prejudice to their rights.

From this decision the plaintiffs appealed. The appeal was heard on the 28th of May, 1876.

Eddis, Q.C., and *T. Stevens*, for the appellants: Both parties are bound by the certificate of the umpire. But if not, the court will look at the certificate of the umpire to 41] see on *what grounds he proceeded, and will divide the compensation between the parties according to their interests. The sum of £2,800 was awarded by the umpire in respect of future loss of trade-profits by those who were carrying on the business. *Chisum v. Dewes* ⁽¹⁾ was an ordinary case of the sale of business premises with the good-will. In the present case the company only took part of the premises in which the business was carried on, and the business may still be carried on, although with a loss from severance. The rights of the parties must be ascertained by their position at the time when notice to treat was given.

(1) 5 Russ., 29.

At that time the mortgagor was in possession, and the mortgagees, in fact, never carried on the business, but it was carried on after the mortgagor's death by the receiver of the court on behalf of the mortgagor's estate. Supposing the mortgagor had made an agreement before his death to sell to the company for £11,950, of which £9,150 was to be compensation for the value of the premises, and £2,800 for loss of profits, and there had been no suit, the mortgagee could not have taken the whole sum of £11,950.

Dickinson, Q.C., and *J. T. Humphry*, for the executors.

Hastings, Q.C., and *Oswald*, for the petitioners, were not called on.

JAMES, L.J.: Really there is no reason for this appeal. It seems to me that the decision of the Vice-Chancellor in this case is quite right. It appears quite a novel thing for a mortgagor to endeavor to take possession of part of the compensation payable for the mortgaged property. It is said that part of the compensation is in respect of the profits of trade. We may see exactly how those words came to be used, and what it was that was really meant by it. There was a trade carried on upon the property. The mortgagees had entered into possession of the property, and the railway company—either before or after they had entered into possession—gave notice to take the property for the purposes of the railway, and gave the usual notice to treat. Then the arbitrators are *appointed, and an [42 umpire is appointed by the arbitrators, expressly to ascertain the compensation which is payable under the act of Parliament by reason of the company exercising their powers. That is not for any other collateral damage which anybody else might have sustained, but it was the compensation for value of the land and for the damage. The mortgagees were the absolute owners in possession of everything. They were the only persons that could have made profits if anybody could make profits of it, and the arbitrators and the umpire had to ascertain what was the proper compensation to make. In ascertaining that they used the words "compensation for severance," and so on, and "for the profits of the business." One must suppose they intended to act under the authority which was given to them—in fact they had no other—by the submission to the arbitration, and they took the profits as one of the elements which entered into their calculation. What must be supposed to be meant was, that in estimating the value they estimated the diminished capacity of the property to make profits for the future. The £2,800 was the estimate, that is to say, treating

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it not merely as a leasehold property, but as a leasehold property upon which a business was carried on, and they said, "We think that for that property and the business which could be carried on upon it, for the good-will of that business and the profits made upon it, that sum ought to be given." It is very much the same case as *Chissum v. Dewes* (1), which has been referred to, which was the case of the sale of a public house and the good-will.

BAGGALLAY, J.A., and LUSH, J., concurred.

Solicitors: *J. W. Hickin; G. Dixon*, agent for Ranson & Nelson, Sunderland.

(1) 5 Russ., 29.

[3 Chancery Division, 43.]

V.C.M., Feb. 19 : C.A., April 11, 1876.

43] **In re* REGENT'S CANAL IRONWORKS COMPANY.

Debentures—Issue at Discount—Security—Pari passu.

The directors of a company were empowered to issue 100 mortgage debentures at £95 for £100. Sixty of these debentures were duly taken up; the other forty were afterwards mortgaged by the directors by way of collateral security for an advance of money. The company was afterwards wound up:

Held (affirming the decision of Malins, V.C.), that the mortgage was not *ultra vires*, and that the mortgagees would receive dividends on the whole amount expressed to be secured by their debentures, *pari passu* with the holders of the other sixty debentures.

THE Regent's Canal Ironworks Company was registered in 1864, with a capital of £250,000, and by the articles of association the directors were empowered from time to time to borrow any sums of money on mortgage or on bonds or debentures, at such rate of interest and upon such terms as the directors might think proper. At a meeting of the directors held on the 21st of March, 1865, resolutions were duly passed for issuing mortgage debentures for £25,000, in 100 debentures of £250 each, issued at £95 for £100. Sixty of these debentures were taken up by different persons, and the remaining forty debentures were issued to J. D. Carnegie and W. H. Carington as trustees for the company. On the 5th of August, 1865, the International Financial Society agreed to advance to the Ironworks Company £8,000 by discounting promissory notes to that amount, bearing 10 per cent. interest, the Ironworks Company giving to the Financial Society forty mortgage debentures for £10,000 as security. The Financial Society accordingly discounted the notes, and Carnegie and Carington trans-

ferred the forty debentures to two trustees for the Financial Society.

By an indenture, dated the 6th of December, 1865, and made between the companies, after reciting that the Ironworks Company had issued to the Financial Society, by way of collateral security for the money so advanced, debentures to the amount of £10,000, it was agreed that if the promissory notes were not paid the Financial Society should be at liberty to sell the debentures, and apply the proceeds of the sale towards the payment of what *remained [44 due to them. The deed also, by way of further security, charged the seventh call then about to be made.

Each debenture was in the form of a deed-poll, by which the Ironworks Company declared itself liable to pay to the person named therein the sum of £250 and interest at 6 per cent., and also charged all the lands, property, and effects which the company held or possessed, or should hold or possess, with the due payment of the principal sum and interest; and on each debenture it was stated to be part of an issue of 100 £250 debentures.

The company was afterwards ordered to be wound up, and there was in court a considerable sum of money, the proceeds of the sale of leaseholds and property. The Financial Society, to whom about £5,600 was due for principal and interest, claimed to prove for the £10,000, and to share with the other debenture holders.

The matter came before the Chief Clerk in Chambers, and was adjourned into court, and heard before Vice-Chancellor Malins on the 19th of February, 1876.

J. Pearson, Q.C., and *Davey*, Q.C., for the Financial Society, cited *In re Anglo-Danubian Steam Navigation and Colliery Company* (*).

Glasse, Q.C., and *C. T. Simpson*, for the other debenture holders, besides using the arguments which were used on the appeal, cited as to the mortgage extending to future calls, *Bowen v. Brecon Railway Company* (*).

MALINS, V.C., after stating the facts of the case, continued: In order to determine this question, we must look to what was the intention of the parties in the original contract when the debentures were issued. It is perfectly clear that every holder of a debenture must, from the face of the debenture, know that he is a holder of a debenture, part of the issue for £25,000, and that they are all alike, there is no priority between them, and they are in every way put upon an equality.

(*) Law Rep., 20 Eq., 339.

(*) Law Rep., 8 Eq., 541.

It has been argued, and to that part of the argument I 45] accede, *that the contract was that they were only to stand upon an equality with those who took the debentures at £95. That, therefore, if any one came subsequently, and took the debentures, not at 6 per cent., but say at 10 per cent., or, instead of paying £95 for them, took them at £50 (which would be much the same thing), then, inasmuch as the contract was that they were to stand on an equality only with those who took the debentures at £95 per cent., and 6 per cent. interest, they ought not to stand on an equality with those who have taken at a lower price or at a greater rate of interest, and ought not to come in competition with them. And if the transaction which I have to deal with had been of that nature, it would have been exceedingly likely that the argument of Mr. Glasse and Mr. Simpson would on that ground have succeeded. But, assuming that to be the right of the parties, did the International Financial Society take these debentures for less than £95 per cent.? It appears that they paid £8,000, and got £10,000 worth of debentures no doubt, but by way of security only. Now, if they took the debentures by way of security, what injury is done to those who were the original holders of the sixty debentures? Their condition is not worse by this transaction. The company required the money, and it was to the advantage of all parties that the money should be had for the purpose of carrying on the operations of the company. The International Financial Society do not claim to hold these debentures as for the full amount, unless the full amount is due to them. But it seems to me that the debentures were issued in pursuance of the powers given by the articles of association, and for the express purpose of being used when the necessities of the company required that they should be used; and, being given by way of collateral security for this debt, it appears to me that the Financial Society is entitled to hold them as a security.

That being the case, I cannot consider that the company paid less for them than what was due upon them; consequently the property must be distributed ratably amongst the holders of the debentures.

The proper form of order will be: The court being of opinion that the Financial Society is entitled to prove for the amount due on the forty debentures transferred to them, 46] with £6 per cent. *interest thereon, *pari passu* with the holders of the remaining sixty, but is not to receive more in the whole than what is due to them for principal, interest, and costs, in respect of the £8,000 advanced by

them with 10 per cent. interest. Let the matter be referred to Chambers for an account to be taken accordingly.

The other debenture holders appealed from this decision, and the appeal came on to be heard on the 11th of April, 1876.

Glasse, Q.C., and C. T. Simpson, for the appellants: These debentures were not properly issued. The directors had no right to issue them to trustees. Moreover, nothing was paid for them by the trustees, and the present holders, as transferees, cannot be in a better position than their transferors. They cannot hold, as against the other debenture holders who paid £95 per cent. debentures for £10,000 on which they paid only £8,000. Nor had the directors any right to issue these debentures on any other terms than at 5 per cent. discount and 6 per cent. interest; but they issued them at an unknown discount, and 10 per cent. interest. The issue of these debentures for less than the other debenture holders paid was a breach of faith, and *ultra vires* and void: *In re Blakely Ordinance Company* (¹); *Pellatt's Case* (²). Our security is not on six-tenths of the assets, but on the whole. The debentures might perhaps have been issued at a discount, but could not be issued as collateral security. The property of the company might be made collateral security, but not these debentures.

J. Pearson, Q.C., and Davey, Q.C., for the Financial Society, were not called upon.

JAMES, L.J.: I think that the order of the Vice-Chancellor cannot be disturbed.

The position of the appellants is this: They are the owners of six-tenths of an aggregate mortgage of £25,000. They became the owners of that six-tenths of the debenture debt with full notice *that the company intended to [47 deal with the other four-tenths as they might be advised. The company has accordingly dealt with the other four-tenths by making it a collateral security for the sum of £8,000 and interest at 10 per cent. That was the bargain between the Financial Society and the company. The company could not recede from that bargain, and I cannot see that there is any equity on the part of the holders of the other six-tenths of the mortgage debt to alter the bargain between the debtors and the creditors.

That being so, it seems to me that the order must remain. The respondents have got this four-tenths of the mortgage debt quite as much as the appellants have got the six-tenths, and the mode in which that four-tenths is to be ap-

(¹) Law Rep., 8 Eq., 244.

(²) Law Rep., 2 Ch., 527.

plied is governed by the instrument which was executed between the company and the creditors. I think the Vice-Chancellor was quite accurate in saying that it is their right to have it treated as a collateral security, and to have what is due on the four-tenths ascertained in exactly the same way as what is due on the six-tenths is ascertained, and of course to be applied, so far as may be wanted, in payment of what is due in respect of the £8,000 and interest.

I do not see my way to altering the order of the Vice-Chancellor in any respect.

MELLISH, L.J.: I am of the same opinion.

It appears to me that the proper way of looking at this case is to inquire what was the bargain with respect to these debentures as between the Ironworks Company and the Financial Society, and then to inquire whether the other debenture holders have any equity to prevent that bargain from being carried into effect. Now, as between the company and the society, there is no doubt that the debentures were to be a collateral security for the money which was lent upon the promissory note and the interest. That was the bargain between them, and one of the terms of the bargain was that the Financial Society was to be entitled to sell the debentures. Mr. Glassey argues, in the first instance, that because the resolution of the directors was that they should be issued at £95 and at 6 per cent. interest, they [48] could not be issued on any other terms. *But that was nothing more than a resolution of the directors, and they were perfectly competent to vary that resolution, and to issue them in any other way.

Then the real question is, have the other debenture holders any equity to prevent that bargain from being carried out? The rights of the other debenture holders depend solely on their debentures, and they have nothing to do with the resolution of the directors as to the terms on which the debentures were to be issued. They can claim no greater rights than the debentures give them. The debenture says that the whole number is to be 100. The appellants have got sixty, and they are all to have an equal security. They took theirs by giving no doubt £95, and getting £100 security for each £95 that they advanced. Those were the terms, and they left it open to the directors to issue the others on any other terms they might think advisable. I do not see any reason why they should complain of the terms upon which the directors did issue them, namely, as a collateral security for the payment of the notes and interest. They are not injured as the debenture cannot

be paid twice over—they can only be paid once. The order treats them as a collateral security, and says that they are to be available until the holders are paid the whole amount for which they were intended to be a collateral security. That order appears to me to be quite correct.

BAGGALLAY, J.A.: I am of the same opinion. It appears to me that the directors had power to do that which they did, namely, to issue the debentures for £10,000 as a collateral security for the loan of £8,000, which was primarily secured by the promissory notes. If the matter had rested here, it seems to me that there could have been no question as regards the propriety of the order made by the Vice-Chancellor, but in the course of the argument it has been suggested that, at a subsequent period, the Financial Society, not being satisfied with the security which they held, applied for a further security, and that they had, by way of further security, a charge upon the future calls to be made by the company, that is to say, a charge upon property which was not included in the property upon which the debt was charged. Any moneys received by *virtue [49 of that charge, upon future calls would no doubt be properly applied in reduction of the debt itself, but cannot, as it appears to me, in any way be regarded as a reduction of the security which they held on the debentures.

JAMES, L.J.: The appeal will be dismissed with costs.

Solicitors: *C. Morgan; G. M. Clements.*

[8 Chancery Division, 49.]

V.C.M., March 20: C.A., June 1, 1876.

SMITH V. WEBSTER.

[1874 S. 127.]

Statute of Frauds (29 Car. 2, c. 3, s. 4)—Memorandum of Agreement—Signature by Agent.

W. entered into a verbal agreement with A. to sell him an inn called the Lion Inn for £950. On the following day W.'s solicitor wrote to A.'s solicitor: "W. has been with us to-day, and stated that he had arranged with your client A. for the sale to the latter of the Lion Inn for £950. We therefore send herewith draft contract for your perusal and approval":

Held (reversing the decision of Malins, V.C.), that this letter was not such a note or memorandum of an agreement as is required by the Statute of Frauds.

ON the 3d of December, 1873, the plaintiff William Allen, on behalf of himself and the plaintiff R. W. Smith, entered into a verbal agreement with the defendant W. Webster for the sale by the defendant to Allen and Smith of certain

premises known as the Golden Lion Inn, at Worksop, and the fee simple in possession, for the sum of £950. The evidence of the plaintiff Allen and the defendant was in direct contradiction as to whether anything was said as to a formal contract being drawn up. The same parties also entered into an agreement at the same time for the purchase by the plaintiffs from the defendant of certain brewing utensils in an inn at Retford which belonged to the defendant.

On the 4th of December, 1873, the defendant called upon his solicitors, Messrs. Marshall & Co., and informed them [50] that he had entered into a verbal arrangement for the sale of the messuage and premises at Worksop for £950, and instructed them to prepare an agreement. Messrs. Marshall & Co. thereupon prepared the draft of a formal contract in writing for the sale of the premises, and forwarded it on the same day to Mr. J. Whall, of Worksop, who was the plaintiff's solicitor, together with the following letter :

"Dear Sir,—Mr. W. Webster, of the Golden Lion, Worksop, has been with us to-day, and stated that he had arranged with your client, Mr. Allen, for the sale to the latter of the Golden Lion for £950. We therefore send herewith draft contract for your perusal and approval."

The draft contract was shortly afterwards returned by Mr. Whall to Messrs. Marshall & Co., with some alterations therein. Messrs. Marshall & Co. sent the contract so altered to the defendant, and requested him to sign it. The defendant, however, did not sign it, giving as his reason that the plaintiffs had refused to carry into effect their agreement to purchase the brewing utensils at Retford. The defendant alleged that the plaintiffs had agreed to give £28 for them.

The plaintiffs asserted that the price was £15, and ultimately the plaintiffs paid for them at a valuation of £16 10s. The defendant alleged that the agreements for the sale of the utensils and of the Golden Lion were parts of one and the same agreement, and treating the refusal to pay £28 for the utensils as a breach of the agreement, he refused to carry it into effect as regarded the inn at Worksop. The plaintiffs thereupon filed their bill for specific performance, and the defendant by his answer claimed the benefit of the Statute of Frauds.

The case came on for hearing before Vice-Chancellor Malins on the 20th of March, 1876.

Robinson, Q.C., and Smart, for the plaintiffs: The ver-

bal contract on the part of the defendant to sell the Golden Lion Inn for £950 to the plaintiff is admitted on both sides, and this, if in writing, would have been sufficient, without any more formal document: *Fowle v. Freeman* ('). The only *question is, whether the plaintiff can get off his [51] agreement on the ground that there was no valid contract in writing within the Statute of Frauds. The statute says that such a document must be signed by the party to be charged, or by his agent lawfully authorized thereunto. We submit that the defendant's solicitors, the Messrs. Marshall, were agents with authority from the defendant to prepare the contract and to communicate the terms thereof to the plaintiff or his agent. This is like the case of *Owen v. Thomas* ('). We say that the communication made by the solicitor was a communication in writing by the vendor's agent thereunto lawfully authorized sufficient to satisfy the statute.

The allegation that the agreement to sell the house was part of an agreement to sell also the brewing utensils, and one was to depend upon the other, is a mere pretence. The brewing utensils were in a different town, and when the dispute arose as to the price, that was settled by arbitration, and the money paid and the utensils handed over.

Glasse, Q.C., and *Simmonds*, for the defendant: There was no document signed by the defendant. It was a mere verbal agreement. The defendant authorized his solicitor to prepare a contract, but that very direction affords cogent reason that the defendant never intended it should be binding upon him until executed. This was the case in *Ridgway v. Wharton* (').

It is not within the scope of a solicitor's business to act as agent for the sale of property. These solicitors were never constituted agents of the defendant; their only duty was to prepare a contract which was about to be entered into. There was to be no contract binding upon the defendant, except that which, upon being reduced into form, should be signed by him. There could be nothing more dangerous than that a communication made by a man's solicitor, without authority to sign a contract, should have the same effect as a written agreement signed by the party himself.

Even when the draft of the contract was sent to the plaintiff's solicitor it was not accepted, but alterations were made in it which the defendant alleges to be material; how

(') 9 Ves., 351.

(*) 3 My. & K., 353.

(*) 3 D. M. & G., 677; 6 H. L. C., 238.

52] then can the document *constitute a final contract in writing? *Earl of Glengal v. Barnard* (*).

Robinson, in reply: Where a solicitor has been instructed by a vendor to carry out a contract, and has accepted the alterations of the purchaser, and has had the contract engrossed for signature, that is a document in writing by the agent of the vendor which comes within the statute. The solicitor cannot say he was not the agent of the vendor to put his name to the terms of the agreement. He was avowedly the agent for sending the written agreement, and was therefore the agent for settling the terms of the contract already agreed upon between the parties.

MALINS, V.C.: This is distinctly stated by the defendant: "On the 3d of December, 1873, I admit that the plaintiff W. Allen and I came to a verbal agreement whereby the said W. Allen agreed to purchase from me, and I agreed to sell to the plaintiffs, the said messuage and premises and the inheritance in fee simple, free from incumbrances, at or for the price of £950." And that is as distinctly asserted by the plaintiffs. Now, if that verbal agreement had been simply reduced into writing, however informal it might have been, "I agree to sell the Golden Lion to you for £950, and I shall instruct my solicitor to prepare a formal contract," then the authorities, which do not even begin with *Fowle v. Freeman* (*) always referred to on such subjects, and which has been here referred to again, have laid it down that the circumstance of a more formal contract not being prepared does prevent the original contract being binding.

This is the case of a contract most distinctly entered into, and the terms of which admit of no shadow of doubt whatever. But then comes the Statute of Frauds, which upon broad public principle has made it the law that you cannot charge a man with a contract relating to land unless there be a note or memorandum of it in writing, signed by the 53] party to be charged, or some other *person thereunto by him lawfully authorized. The decisions under that statute have been uniform, viz., that it is not necessary that there should be mutuality; it is quite sufficient that the party to be charged has himself signed, or has signed by some person duly authorized by him.

In *Owen v. Thomas* (*) the parties agreed, as in the present case, by a verbal contract only, and as soon as the agreement was come to, the plaintiff by the direction of the defendant wrote and sent to the defendant's solicitor, Mr.

(*) 1 Keen, 769.

(*) 9 Ves., 351.

(*) 3 My. & K., 353.

Church, the following letter, which was signed by the defendant:

"Mr. Samuel Church.

"Dear Sir,—I have this day sold the house, &c., in Newport to Mr. John Owen for 1,000 guineas, and I am to receive the next half-year's rent, the money to be paid as soon as the deeds can be had from Mr. Deere, and you will be pleased to lose no time in getting them from him."

In that case, inasmuch as the contract was signed by Mr. Thomas, there was no difficulty in that respect, he being the vendor; but the principal difficulty arose in this way: it has always been considered necessary to ascertain what was the subject-matter of the contract. All that was there described was "the house at Newport," and Sir John Leach decided that, as "house" was indefinite, therefore on that subject parol evidence was, as is always the case, admissible to show what the contract was. This case presents no difficulty of that kind, as the subject-matter of the contract is admitted on both sides to be the Golden Lion at Worksop.

Now, the statute says there must be a memorandum in writing of the terms of the contract, signed by the party sought to be charged, or by his agent thereunto lawfully authorized. The only memorandum here signed is the memorandum by Messrs. Marshall & Co. to Mr. Whall, of Worksop, the plaintiff's solicitor:

"Dear Sir,—Mr. Webster, of the Golden Lion, Worksop, has been with us to-day, and stated that he had arranged with your client, Mr. Allen, for the sale to the latter of the Golden Lion for £950; we therefore send herewith draft contract for your perusal and approval."

*Now, when the parties separated on the 3d, although [54 no doubt there was as clear a contract between them as ever there was in the world, still it was not such a contract as could have been enforced, because it was, so far, merely by word of mouth. Mr. Webster then goes to his solicitor, and gives him instructions to prepare a formal contract.

Arguments have been addressed to me to show that the solicitor had no authority to sell his client's property, but I think that requires and admits of no argument. He gives him directions to do all things necessary to carry the contract into effect. Then what was the extent of the authority given to Messrs. Marshall & Co.? It is admitted in effect that the defendant goes to them and says, "I have sold the Golden Lion Inn at Worksop to Mr. Allen for £950. Do all things that are necessary to carry that contract into effect."

Clearly that is an authority to prepare a contract. It is perfectly clear that the preparing of that contract was not in any way to be binding on the defendant until that contract was signed. If nothing more had taken place, there it would have stopped, and nothing could have been enforced, for then there would have been no communication with the plaintiff. The question, to my mind, is, what was the extent of the authority? Was it an authority by the vendor to prepare a contract to sell the inn for £950, and an authority to his solicitors to communicate to the solicitors on the other side the terms of the contract? If it was an implied authority to do all things that were necessary, then it was an authority to communicate not only the terms and the price, because the plaintiff did not want to have communicated to him what was the price he had agreed to give for the inn, but it seems to me it was an authority to do all things necessary to carry the contract into effect; and among other things it was necessary that they should write to the agent of the plaintiff. Of course the agent of the plaintiff would be his solicitor. Then, were the defendant's solicitors at liberty to tell the plaintiff's agent what the terms of the contract were? It seems to me they were the agents of the defendant not only for the purpose of carrying the contract into effect, but that that involves an authority to tell the agent of the plaintiff what those terms were. Therefore, although I am quite clear there could be no implied authority on Messrs. *Marshall's part to enter into a contract, there was an authority to Messrs. Marshall to effect a contract already deliberately entered into between the vendor and purchaser, upon certain terms, and that authority included an authority to communicate what those terms were. If they had that authority, the Statute of Frauds is complied with, because there must be a contract. It need not be a formal contract in writing, but there must be a note or memorandum of it of some kind signed by the party to be charged therewith, or by his agent lawfully authorized.

Now, I think this is a case in which the court would desire to carry into effect such a contract if possible, looking at what the contention has been before me. The only contention I have heard was this. There was one contract for the purchase of some brewing utensils, not in the Golden Lion, but somewhere in the neighboring town of East Retford. The defendant says he was to have £28 for these brewing materials. The plaintiff seems to have misunderstood it in some way, and therefore went to a third person, who fixed the value at £16 15s. That sum was paid, and the defen-

dant therefore, having had the value of his brewing utensils, ought, I think, to have been satisfied. But, because he did not get the whole sum of £28 that he claimed, then he says, "Although I have deliberately sold you the Golden Lion for £950, and although I have so unequivocally exhibited my intention of so doing that I have instructed my solicitors to prepare a contract, and it has been prepared, I am not bound by the Statute of Frauds, and therefore I set the contract entirely at defiance." That is a contract which every court would endeavor to find the means of enforcing, if possible, against a vendor who had so entered into it. But I have come to the conclusion on the whole of the case that the authority the vendor gave to his solicitors to carry the contract into effect was an authority to communicate the terms to the other side, and therefore by that delegation of authority it becomes the statement of his agent thereunto lawfully authorized, in which statement the terms were correctly set forth, as he says by his answer.

This is a decision on a somewhat new point, which may not be free from doubt; but I think, on the whole, the anxiety which is always shown by the court to bind men to their own deliberate acts justifies me in holding this gentleman to his contract, *for the carrying into effect of [56 which he gave authority to his agent.

The decree, therefore, will be for the specific performance of the contract.

There will be the usual reference as to title, and the plaintiff must have the costs.

The defendant appealed from this decision, and the appeal came on to be heard on the 1st of June, 1876.

Glasse, Q.C., and *Simmonds*, for the appellant: The letter of Marshall & Co., if it is a memorandum of any contract, is a memorandum of an open contract, without any limitation of the right of the purchaser to require a marketable title and call on the vendor to furnish at his own expense all the evidence in support of it. Into such a contract the vendor never intended to enter. The solicitors had no authority to sign any document which should bind the defendant. Their letter was written with an entirely different view.

Robinson, Q.C., and *Smart*, for the plaintiff: The reference to a more formal contract does not prevent an informal memorandum from being binding.

[JAMES, L.J.: It is much to be wished that some of the cases on that head could come before an authority competent to overrule them. On several occasions parties have

found themselves entrapped into a binding contract when they never considered themselves to have entered into any agreement, but thought they were only settling one term of the contract—the price.]

The solicitors received authority to do what was necessary to carry the agreement into effect, and that includes an authority to signify in writing its terms to the other party.

[*Jackson v. Lowe* (1) and *Jackson v. Oglander* (2) were referred to.]

JAMES, L.J.: I am of opinion that this cannot be considered such a memorandum *in writing as is required by the Statute of Frauds. The statute requires that the agreement, or a "memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized;" that is to say, lawfully authorized to sign a contract, or to sign a memorandum or note of the contract.

In this case there is no such contract signed by the defendant himself. He goes to his solicitor, and the only authority he gives his solicitor is to prepare a formal document; he gives him no authority to do anything more. Supposing the letter had run thus: "Mr. Webster has been with us to-day, and has told us that he has sold the property to you for £950." It is quite clear that that, even assuming the solicitors to have authority to sign a binding memorandum, would not have been a memorandum or note of an agreement within the meaning of the Statute of Frauds; it would have been a mere communication of a fact, and the signature would not make it a binding memorandum, not being affixed *eo intuitu*. All that the solicitors say is, that they are informed by the defendant that a verbal arrangement has been entered into for the sale of the property at a certain price, and that they therefore send a draft of the contract, which is a different contract, and is not the contract sought to be enforced. It is a contract which was never assented to by the parties, and they were never at one upon it. That being so, it appears to me impossible to make out a contract from a solicitor merely giving a reason why he was sending a document to the other man's solicitor. I do not think that can be, within the meaning of the Statute of Frauds, a memorandum signed by a man authorized to sign it as binding the person interested.

I am of opinion, therefore, that the Vice-Chancellor's doubts were well founded, and that this is not a memorandum within the meaning of the Statute of Frauds.

(1) 1 Bing., 9.

(2) 2 H. & M., 465.

BAGGALLAY, J.A.: From the evidence in this case other than that furnished by the letter of the 4th of December, 1873, it appears to me that the arrangement or agreement come to by Mr. Webster on the 3d of December was to sell the Golden Lion for £950, but that that *arrangement [58 or agreement was conditional upon a formal contract being signed. It appears to me also clear that the authority which was conferred upon the solicitor by Mr. Webster was not to convert that conditional agreement into an absolute agreement, but to prepare, and to procure to be executed, a proper contract which would express the terms of the agreement. That being the case, if the letter of the 4th of December, 1873, could be construed as in fact expressing an agreement absolutely to sell the property for £950, I should be of opinion that the solicitors had no authority to write such a letter, and that they were not persons lawfully authorized by their principal to sign it. But when I look at the letter it appears to me to be clear what was the intention of the parties. The reference to the arrangement for the sale of the Golden Lion for £950 is merely in the nature of a recital showing why Messrs. Marshall addressed to him that letter. It says: "We therefore send herewith draft contract for your perusal and approval." The very addition of those words, "perusal and approval," appears to me to indicate that they were not thereby confirming or entering into an agreement, but that they were merely forwarding that draft contract for approval.

Therefore I think the decision of the Vice-Chancellor must be reversed.

LUSH, J.: I am of the same opinion. In order to satisfy the statute a note or memorandum must be one which the principal has authorized the agent to sign as a record of the transaction. Now the authority to the solicitors here was not to write a letter which should contain the terms of the contract, but merely to prepare a formal draft contract to be sent to the other side for perusal and approval, and when perused and approved to be signed by the parties themselves. That is all the authority which the solicitors had. The statement as to the substance of the contract was merely introductory to the business which they were commissioned to transact. The letter was never intended by them to be a contract, nor to be anything binding.

Solicitors: *R. Smith; W. H. Tattam.*

The memorandum required by the Statute of Frauds must be a complete statement of the terms of the contract so that the same may be gathered there-

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In re Tharp.

C.A.

from without the aid of oral evidence: 2 Eng. Rep., 315 note; 12 id., 217 note; *Grace v. Denison*, 114 Mass., 16; *Hope v. Dixon*, 22 Grant's (U.C.) Chy., 439; Boston, etc., v. Babcock, 3 Cush., 228, 232; *Baker v. Glass*, 6 Munf. (Va.), 212; *Browne on St. of Frauds*, §§ 371-435; *Fry on Specif. Perf.*, §§ 221, 222; *McElroy v. Buck*, 35 Mich., 434.

See *County of Huron v. Kerr*, 15 Grant's (U.C.) Chy., 265.

A written agreement to convey lands "for \$25,000 and mortgage to remain at 5 per cent. for 5 years," is not a sufficient memorandum of sale to be spe-

cifically enforced in equity: *Grace v. Denison*, 114 Mass., 16.

Though it is sufficient if it make another written or printed paper, i.e., printed terms of sale—a part thereof when the same may be referred to for the terms though not annexed: *Dalton v. McBride*, 7 Grant's (U.C.) Chy., 288; *Crooks v. Davis*, 6 Grant's Chy., 317; 1 Month. West. Jur., 97.

Though such extrinsic instruments referred to must be identified in the memorandum: 1 Monthly Western Jur., 97-106, an excellent article upon the subject.

[8 Chancery Division, 59.]

C.A., July 15, 1876.

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*In re THARP.

Settled Estate—Lunatic Protector of Settlement—Consent of Court to barring Entail—Interest of Lunatic.

A lunatic was tenant for life of the advowson of a rectory and other real estate. Under the order of the court a lease of the property for ninety-nine years, if the lunatic should so long live, had been made to two persons at a large rent. This lease had become vested in the administrator of the survivor of the two lessees, the administrator being also the first tenant in tail in remainder expectant on the death of the lunatic without issue male. The lunatic was aged eighty-two, and had never had any issue. The administrator wished to sell the next presentation to the rectory, and petitioned the court, as protector of the settlement, to consent to the barring of the entail of the advowson so far as might be necessary for effecting the proposed sale:

Held, that, as the application was not for the benefit of the lunatic's estate, but only for the benefit of a collateral, the court ought not to interfere.

JOHN THARP was found a lunatic by inquisition on the 17th of January, 1816. He was tenant for life of certain settled real estates, including the advowsons of the rectory of Snailwell and the vicarage of Chippenham, in the county of Cambridge. Under the provisions of the settlement, W. M. Tharp, the petitioner, was the first tenant in tail in remainder expectant on the death of the lunatic without issue male. The lunatic was of the age of eighty-two. He had been married, but his wife was dead, and there had never been any issue of the marriage.

On the 27th of December, 1864 (in pursuance of an order made in Lunacy and Chancery on the 1st of July, 1864), the lunatic, by his committee, executed a lease of part of the settled estates (including the advowsons) to J. S. Tharp and J. M. Gordon Tharp, from the 25th of March, 1864, for ninety-nine years, if the lunatic should so long live, at a

rent of £2,500, and subject to certain covenants. Both the lessees were dead. J. M. Gordon Tharp was the survivor, and administration to his estate was granted to the petitioner.

The petitioner desired to have the next presentations to the rectory and vicarage sold, and for that purpose to bar, so far as might be necessary, his estate tail and the remainders over; and *the petition asked for the concurrence [60 of the court in the place of the lunatic as protector of the settlement.

The present incumbent of both livings was the Rev. A. J. Tharp, who was aged seventy-one, and in weak health. He was also the next tenant in tail in remainder expectant on the death of the petitioner without issue male. The petitioner had been married for some years, but had had no issue. The petition stated that it would be greatly to the advantage of the persons interested in the patronage of the benefices that the next presentations thereto respectively should be sold, inasmuch as if the benefices should become vacant, the value of the presentations would be lost to the estate. Moreover, the petitioner, in his character of administrator to the estate of J. M. Gordon Tharp, required any pecuniary interest which he might be entitled to in the proceeds of sale for the purpose of paying debts of the intestate.

J. Pearson, Q.C., and W. B. Heath, for the petitioner: The petitioner being in possession under the lease, this is a reasonable application.

Langworthy, for the Rev. A. J. Tharp: The application is not made for the benefit of the lunatic's estate. It can only benefit one collateral at the expense of another, and my client is a nearer relation to the lunatic than the petitioner is.

JAMES, L.J.: I do not think that we ought to interfere. There is nothing affecting the interests of the lunatic himself or his estate. The term was only created for the purpose of putting the family in possession of the family estates. I think that the advowson ought to be left to go with the estates.

MELLISH, L.J.: As a general rule, the owner of an estate does not wish to separate a family living from the estate. The petitioner is now in a position to sell the next presentation, subject to the risk of his dying before the lunatic.

Solicitors: *Western & Sons; Ford & Lloyd.*

[8 Chancery Division, 61.]

C.A., July 15, 1876.

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**In re* REYNOLDS.*Fund in Court—Money to be laid out in Land in Settlement—Payment out to Tenant in Tail—Disentailing Deed.*

A fund in court in a lunacy, the lunatic being dead, represented land in settlement. A deceased tenant in tail had created a base fee:

Held, that the fund could not be paid out to the persons claiming through him, except upon the production of a deed enlarging the base fee.

In re Butler's Will ⁽¹⁾ followed.

THIS was a petition in the lunacy of C. C. Reynolds, who died in 1858.

In pursuance of an order made by the Lords Justices on the 25th of June, 1860, a sum of £443 6s. 4d. consols was carried over to an account intituled "Share of George Reynolds, deceased; the account of the real estates." This fund had arisen from the sale, under the provisions of a private act of Parliament, of real estates of which the lunatic was tenant in tail. George Reynolds was a brother of the lunatic, and was entitled as tenant in tail in remainder, expectant on the death of the lunatic without issue, to a share of the estates. The lunatic died without issue. George Reynolds left surviving him a widow, and two daughters his only children. He had converted his estate tail into a base fee. The widow and daughters (the daughters having recently attained twenty-one) presented this petition, asking that the consols might be sold, and the money arising from the sale (after payment of costs) be paid to them.

E. W. Byrne, for the petitioner: Till recently it was the practice of the Court of Chancery to pay out money representing land in settlement to the persons who were capable of disentailing it, without requiring the execution of a disentailing deed. The Lords Justices did this in *Re Watson* ⁽²⁾. But in *In re Butler's Will* Lord Selborne required a disentailing deed, and a similar course was adopted by the Master of the Rolls in *In re Broadwood's Settled Estates* ⁽³⁾; Vice-Chancellor *Malins, however, *In re Wood's Settled Estates* ⁽⁴⁾, followed the old practice.

JAMES, L.J.: We must follow the decision of Lord Selborne, which was in truth a decision of the Lord Chancellor, though he was then exercising an original jurisdiction in a

⁽¹⁾ Law Rep., 16 Eq., 479.

⁽²⁾ 1 Ch. D., 438.

⁽³⁾ 10 Jur. (N.S.), 1011.

⁽⁴⁾ Law Rep., 20 Eq., 372.

matter attached to the Rolls Court. The fund can only be paid to the petitioners upon the production to the Registrar of a proper deed enlarging the base fee.

MELLISH, L.J., concurred.

Solicitor: *E. Byrne.*

[3 Chancery Division, 109.]

V.C.H., April 25, 1876.

*FARQUHARSON V. FLOYER.

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[1871 F. 49.]

Marshalling Assets—Pecuniary Legacies—Residuary Devises—Insufficient Personality—Hensman v. Fryer not followed.

Where there is a bequest of pecuniary legacies and devises of real and residuary real estates, and an insufficient amount of personalty for the payment of debts, the pecuniary legacies must be first resorted to to make up the deficiency.

Collins v. Lewis ⁽¹⁾, *Dugdale v. Dugdale* ⁽²⁾, and *Tompkins v. Colthurst* ⁽³⁾, followed; and *Hensman v. Fryer* ⁽⁴⁾ not followed.

THE testator in this case, by his will and the codicils thereto, after bequeathing several pecuniary legacies, devised a real estate to the trustees, and directed them to sell the same and apply the proceeds in aid of the personalty in the payment of his debts, and then devised another real estate in strict settlement to one son, and his issue, and another real estate, and also his residuary real estate, to another son in strict settlement, and his issue. There was an insufficiency of the personalty even with the addition of the proceeds of the devised real estate which was directed to be sold.

Hastings, Q.C., and *Macnaghten*, for the plaintiffs, submitted that the decision in *Hensman v. Fryer*, in which it was held by Lord Chelmsford, reversing the judgment of Vice-Chancellor Kindersley, that the legatee of a legacy of £2,000 and the residuary devisee were liable to contribute to the debts of the testator, which his general personal estate was insufficient to satisfy, according to the respective values of the legacy and of the estates devised, ought to be followed in this case, and that personal estate and the residuary real estate ought to be applied proportionately in payment of the debts, notwithstanding that Vice-Chancellor Stuart, in the case of *Collins v. Lewis*, held that a pecuniary legatee had no right whatever to call upon a residuary devisee to contribute to the payment of debts, and said that the decision in the case of *Hensman v. Fryer* was clearly a mis-

⁽¹⁾ Law Rep., 8 Eq., 708.

⁽²⁾ 3 Eng. Rep., 710.

⁽³⁾ 1 Ch. D., 626.

⁽⁴⁾ Law Rep., 3 Ch., 420.

110] taken decision, and declined to *follow it; and that Vice-Chancellor Malins, in the case of *Dugdale v. Dugdale* ⁽¹⁾, had said that the point as to marshalling the deficiency between the legacy and the real estate was decided in *Hensman v. Fryer* ⁽²⁾ under a misapprehension as to the effect of the decision in *Tombs v. Roche* ⁽³⁾, and therefore he refused to follow it. Since those cases were decided, the case of *Lancefield v. Iggulden* had come before the courts. The main question there was whether specifically devised estates were liable to contribute ratably with the residuary real estate to meet the deficiency of the personal estate, and Vice-Chancellor Bacon held ⁽⁴⁾ that they were not liable to contribute till the real estate comprised in the residuary devise had been exhausted; but on appeal Lord Cairns remarked ⁽⁵⁾: "I feel bound to say that I look upon *Hensman v. Fryer*, decided by Lord Chelmsford, as a direct decision on this particular point. It was a most carefully considered judgment, and was a distinct expression of opinion by the Judge who was then the head of this court, that the Wills Act had made no alteration in the law in this respect. Therefore, both on principle and authority, I feel bound to come to a different conclusion from the Vice-Chancellor in this case, and his decree must be altered accordingly." And Lord Justice James, after stating that he was of the same opinion, said: "I well recollect the decision of Lord Chelmsford in *Hensman v. Fryer*, and the extent to which it was canvassed at the time, and I was never able to see what answer could be made to the principle on which he based his judgment. . . . I think that the decision of Lord Chelmsford is binding upon the other branches of the court. It was a decision deliberately pronounced for the purpose of settling the differences which existed between the various branches of the court, and I think it ought to have been treated as settling the question." But subsequently to the decision in *Lancefield v. Iggulden*, the case of *Tomkins v. Colthurst* ⁽⁶⁾ had come before Vice-Chancellor Malins. The question there was, whether there was a liability between pecuniary legatees, specific legatees, and specific devisees, to contribute ratably to make up a deficiency of the personal *estate to pay the debts and funeral and testamentary expenses of the testator, and Vice-Chancellor Malins in his judgment said ⁽⁷⁾: "But the other point" (that of marshalling in case of deficiency of personal estate

⁽¹⁾ Law Rep., 14 Eq., 234.

⁽²⁾ Law Rep., 3 Ch., 420.

⁽³⁾ 2 Coll., 490-502.

⁽⁴⁾ Law Rep., 17 Eq., 556.

⁽⁵⁾ Law Rep., 10 Ch., 136, 141.

⁽⁶⁾ 1 Ch. D., 626.

⁽⁷⁾ 1 Ch. D., 628, 629.

to pay debts) "decided in *Hensman v. Fryer* (¹), was a reversal of the settled rule of the court. . . . In *Collins v. Lewis* (²) the same point came before Sir John Stuart, who, as Vice-Chancellor, had greater experience of the mode of administering estates in Chancery than Lord Chelmsford. The Chancery bar, as well as the judges and other persons familiar with the practice of that court, know the rule perfectly well, and if Lord Chelmsford had been as firmly impressed with that view, he would not, I think, have come to the conclusion to which he did come." And, after referring to the decision in *Lancefield v. Iggulden* (³), the Vice-Chancellor added: "I cannot think that the learned judges, by expressions in that case which directly refer only to points which did arise, intended to adopt a rule which would reverse the old and well-settled practice of the Court of Chancery, upon an entirely distinct point. I must therefore continue to follow the old rule as to the marshalling of assets." And he still refused to follow the decision in *Hensman v. Fryer*. But it is submitted that it ought to be followed in this case, and the judgments in the other cases disregarded, particularly as in the case of *Jackson v. Pease* (⁴), where there was insufficient personalty to pay the costs of an administration suit, the decision in *Hensman v. Fryer* was in effect followed by this branch of the court.

Hinde Palmer, Q.C., and *Cecil Russell*, for the defendants were not called upon.

HALL, V.C.: I am of opinion that it must be considered settled that pecuniary legacies must be resorted to before real estate for payment of the debts of the testator.

The decisions of Vice-Chancellor Stuart in *Collins v. Lewis*, and Vice-Chancellor Malins in *Dugdale v. Dugdale* (⁵) and *Tomkins v. Colthurst*, are in accordance with the decision of Lord Cottenham *in *Mirehouse v. [112 Scaife* (⁶), and I shall follow them. I do not consider that in so doing I am acting in opposition to the authority of the Court of Appeal in *Lancefield v. Iggulden*.

Solicitors: *Lawford & Waterhouse; E. M. Hore.*

(¹) Law Rep., 3 Ch., 420.

(⁴) Law Rep., 19 Eq., 96.

(²) Law Rep., 8 Eq., 708.

(⁵) Law Rep., 14 Eq., 234.

(³) Law Rep., 10 Ch., 138.

(⁶) 2 My. & Cr., 695.

When debts and legacies charged upon real estate, and when legacies abate *pro tanto*, see 10 Eng. R., 731 note; 14 Eng. R., 237 note.

Before lands devised will be charged with pecuniary legacies, an intention to charge them must clearly appear,

either by the direct terms of the will or by an implication too plain to be mistaken: *Kirkpatrick v. Chestnut*, 5 Richardson's S. C. Rep., N.S., 216; *Perry v. Walker*, 12 Grant's (U.C.) Chy., 370; *Bevan v. Cooper*, 7 Hun, 117; *Spillam v. Duryea*, 51 How. Pr., 280.

While the general rule is that the personal estate of a testator is to furnish the fund for the payment of legacies, it may be entirely exonerated, or the real estate may be made to aid, if there be express directions to that effect in the will, or if that be the clear intent to be gathered from its provisions: *Taylor v. Dodd*, 58 N. Y., 335, affirming *2 Thomp. & Cooke*, 88; *Ragan v. Budd*, 7 Hun, 537; *Wain v. Emley*, 26 N. J. Eq., 243; *Markillie v. Ragland*, 77 Ills., 98; *Davis's Appeal*, 83 Penn. St. R., 348; 9 Chic. Leg. News, 326; *Davidson v. Boomer*, 17 Grant's (U.C.) Chy., 510, and cases cited; affirmed 18 id., 475; *Weld v. Strong*, 54 How. Prac., 133; *Kalbfleisch v. Kalbfleisch*, 67 N. Y., 354.

Where debts and legacies are charged on real and personal estate, and there is *no direction to sell* the real estate, the personality is the primary fund to pay, and the realty is liable only in case of a deficiency: *Davidson v. Boomer*, 17 Grant's (U.C.) Chy., 509, affirmed 18 id., 475.

A testator devised all his real estate to a mortgagee thereof, charged with a legacy in favor of an infant, and bequeathing legacies to other persons. The mortgagee filed a bill claiming to have the sums appropriated as legacies applied to the payment of his mortgage debt: Held, that he was not entitled to be paid out of the personality in preference to the legacies; but that he was entitled to be paid his mortgage debt out of the property so devised to him before the sums charged thereon for legacies were raised: *Ricker v. Ricker*, 14 Grant's (U.C.) Chy., 264.

Where lands are devised subject to the payment of annuities, such lands will be charged in the hands of a purchaser, but they will not where there is a charge of debts; where therefore a testator devised to his daughter all his "real and personal estate of every description, subject to the payment of my just debts, and on condition that my son M. be taken care of as hitherto by her, to have and to hold the said real and personal property, on the condition aforesaid, to her, her heirs, and assigns forever," and appointed her sole executrix: Held, that the devisee could make a good title freed from the charge of the support of the son M.:

McMillan v. McMillan, 21 Grant's (U.C.) Chy., 594.

See *Perry v. Walker*, 12 Grant's (U.C.) Chy., 370; *Jones v. Jones*, 15 Grant's Chy., 40; *Clark v. Clark*, 17 Grant's Chy., 17; *Wain v. Emley*, 26 N. J. Eq., 243.

A legacy is held to be demonstrative, when the testator has bequeathed a certain sum of money or annuity in such a manner as to show a clear, separate, and independent intention that the money shall be paid to the legatee in all events. In such a case the legacy, or any deficiency, is to be paid out of the general estate, when the primary fund set apart for its payment fails, in preference to other legacies. But when it is clearly the intention of the testator that a fund is to be created by the sale of certain property, and the income of the proceeds of such sale paid to the legatee as a specific legacy, it is the duty of the executors to invest the money arising from the sale of the property mentioned in the will, and pay over to the legatee the income arising from such investment only: *Watrous v. Smith*, 7 Hun, 545.

See 11 Eng. Rep., 652 note.

A testator, by his will, after making sundry devises and bequests, proceeded, "And I further leave to my son George all my plate and plated goods, books and pictures, together with all accounts, papers and *personal effects that may be in my possession at the time of my death*, always excepting household furniture, beds, bedding and linen, and these I leave to my daughters (naming them), to be divided share and share alike. * * And I further leave, give and bequeath all my horses, cattle, cows, sheep, and farming implements to my two daughters," being those already named: Held, that the bequests to the son and the daughters were specific, and that the residue, if any, was not disposed of: *McKidd v. Brown*, 5 Grant's (U.C.) Chy., 638.

Realty descended may be subjected to the satisfaction of the debts of the decedent, where the goods and chattels which came to the hands of the personal representative, or the notes taken upon the sale thereof, and good when received, are lost without fault on his part: *Jones v. Douglass*, 1 Tenn. Chy., 631, 632-3, and cases cited; *Comyn's Digest*, Assets, D.

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Otherwise if the personal representative were guilty of a *devastavit*. In such case the loss, if any, would have to be borne by the creditors: Jones v. Douglass, 1 Tenn. Chy., 632-3; 10 Eng. Rep., 735 note; Peck v. Wheaton, 1 Martin & Yerg. 359; Gilman v. Tisdale, 1 Yerg., 285; Elliott v. Patten, 4 Yerg., 10.

Though not if lost by the personal representative, stolen from him, etc.:

Jones v. Douglass, 1 Tenn. Chy., 538; Jones v. Lewis, 2 Ves., 241; Holt v. Holt, 1 Chy. Cas., 109; Furman v. Coe, 1 Caines' Cas. in Error, 96; Stevens v. Gage, 55 N. H., 175.

Where the widow of the testator had received more than her proper share of the personal estate, the court charged her with interest on the excess, in administering the estate: Davidson v. Boomer, 17 Grant's (U.C.) Chy., 509.

[8 Chancery Division, 134.]

V.C.B., April 26: C.A., July 10, 11, 18, 1876.

*ADIE V. CLARK.

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[1862 A. 87.]

Patent—Construction—Evidence—Foreign Patent—Licensee.

A licensee of a patented invention was ordered to account for all instruments made by him pursuant to the patent. He alleged that the instruments which he had made were not covered by the patent according to its true construction, and in support of his contention tendered in evidence a prior American specification (a copy of which was in the library of the Commissioners of Patents, but was not proved to have been known to the patentee) for the purpose of showing that a construction large enough to cover the instruments made by the licensee would make the patent bad for want of novelty, and therefore ought not to be adopted by the court:

Held, that the evidence was inadmissible.

Order of Bacon, V.C., reversed.

Trotman v. Wood (!) observed upon.

THE plaintiff in this case had obtained a patent for a horse-clipper, and had filed a bill against the defendant for the specific performance of an agreement to take from the plaintiff a license to make horse-clippers according to the patent. On the 20th of February, 1874, a decree was made for specific performance, and for an account of all machines or apparatus for clipping horses, if any, constructed or arranged according to the plaintiff's invention, or only colorably differing therefrom, which had been sold by or for the profit of the defendant.

The license was accordingly settled and executed; and in taking *the account the plaintiff sought to surcharge [135 the defendant with 34,534 horse-clippers so made and sold. The defendant contended that he was bound to account only for clippers made by him within the plaintiff's patent, and asserted that these clippers were not within the patent. The patent was, amongst other things, for the parallelism of certain parts called the comb teeth, and the use of a piece of

(!) 16 C. B. (N.S.), 479.

metal to alter what was called the thickness of the comb plate, and the defendant used neither of these. He also maintained that the patent could not bear the meaning put upon it by the plaintiff, for if it did, it would be void for want of novelty; and in proof of this the defendant gave in evidence certain specifications of American patents which were to be found in the English Patent Office Library.

The matter came before Vice-Chancellor Bacon on the 26th of April, 1876, when the same counsel appeared and the same arguments were used as those before the Court of Appeal.

BACON, V.C., after stating the facts, continued: Now Adie's patent, assuming its entire validity, is for improvements and for an arrangement and combination of parts. Such a patent may, no doubt, be maintained, but its limits, scope, and effect cannot be lawfully extended. The law upon this subject is expressed by Lord Hatherley, when Vice-Chancellor, in the case of *Curtis v. Platt*⁽¹⁾, in terms

(1) 1863. Nov. 6. Wood, V.C.

CURTIS v. PLATT.

[1863 C. 92.]

THE plaintiffs in this case were assignees of a patent taken out by one Wain for an improvement in spinning mules, and the bill was filed to restrain the defendants, who were also patentees, from infringing on Wain's patent. The object of Wain's patent was an improved method of alternately reversing the action of the machinery in self-acting spinning mules, the changes to be made being numerous and complicated. Other patents for this object had been obtained, especially one by Lakin & Rhodes, with whom Wain had made an arrangement.

Wain, in his patent, claimed for "The novel construction, combination, and application of mechanism as hereinafter described, whereby one-half of the clutch-box or catch-box hereinbefore and in the specification of Lakin & Rhodes described, or any mechanical equivalent therefor, is connected with and acts upon cams or other similar parts of mechanism for effecting the changes in the action of the mule or other machine of the description before mentioned, direct and without the intervention or use of such eccentric boss and rods, levers, or other mechanical agents combined therefor, as are de-

scribed by Lakin & Rhodes in their specification."

The defendants alleged that the patent was void for want of novelty and of utility, and on account of the insufficiency of the specification; they also denied that they had infringed.

The cause was heard before the Vice-Chancellor Wood, without a jury, in July, 1863, and his honor, on the 6th of November, 1863, delivered judgment, finding that the patent was valid, but that the defendants had not infringed. The judgment contains the following passages:

Then the question is, how far Wain has used this in his patent, and to what extent he can claim a patent right in respect to this invention; and therefore, before reading his patent, I would say a very few words as to what my conception of the patent law is with reference to the rights of an inventor.

In all discoveries of course there are two things—there is an object to be achieved, and a means of achieving that object. Now the object to be achieved may be very old. Of course hundreds of patents have been taken out for achieving objects which in the history of mankind have been achieved by some means or other. No novelty is required as to the object, the novelty may be in the means for effecting the object whether old or new. I agree

so much more clear and forcible *than any which I [136 have the skill to employ, that I am glad to avail myself of his language. [His Lordship then stated shortly the

also with an observation made in the course of the argument, that, on the question of infringement and evasion of a patent for a new object, the court will scan the process very narrowly, and necessarily give greater weight to any evidence which there may be that this other process for effecting the same object is simply colorable instead of being a *bona fide* new invention.

Where the thing is wholly novel and one which has never been achieved before, the machine itself which is invented necessarily contains a great amount of novelty in all its parts, and one looks very narrowly and very jealously upon any other machines for effecting the same object, to see whether or not they are merely colorable contrivances for evading that which has been before done. When the object itself is one which is not new, but the means only are new, one is not inclined to say that a person who invents a particular means of doing something that has been known to all the world long before has a right to extend very largely the interpretation of those means which he has adopted for carrying it into effect. Because otherwise that would be to say that the whole world is to be precluded from achieving some desirable and well-known object which everybody has had in view for years. In such a case it may be said that the means taken are simply mechanical equivalents for the means previously adopted for arriving at the same object. One looks more jealously at the claims of inventors seeking to limit the rights of the public at large for affecting that which has been commonly known to all the world long ago. Of course no patent can be taken out for effecting this as a new object, but only for effecting it by a new means. What those means may be, and what is the extent of a claim which the patentee has a right to insist upon as to those means, is often a matter of much difficulty. We find continually inserted in patents much more than is desirable, and they often contain, as here, those large words, "or any mechanical equivalent," on which some observations were made with regard to the par-

ticular patent which I have before me. I do not think that they apply with much force to this particular patent from the mode in which they are inserted, and the particular object of inserting them where they are inserted. But in a large majority of cases these words as generally used are wholly useless, and being useless, regard being had to the strictness with which in some senses patents are construed, it would be very much better if the words were wholly left out. They amount simply to this, that if anything is claimed which is a mechanical equivalent in the largest sense, then the claim must be too large, though of course that is not the sense in which the court could be led to construe them; and in favor of the patentees the court could only construe them as to give him the benefit which he would have had without inserting the words.

On the part of the plaintiff in this case it was said the words refer only to a mechanical equivalent colorably introduced. Of course the court would take care—whether the patentee has put in the words or not—that no person shall be allowed to substitute a mechanical equivalent or a chemical equivalent, as the case may be, for doing the same thing without the slightest degree of invention on the part of the person who substitutes it, or any benefit whatever to be derived from that apparently new mode. . . . I think it extremely important to follow the rule laid down in the House of Lords in *Seed v. Higgins* (8 H. L. C., 550), that if you find a specific mechanical improvement claimed, then you must hold the person strictly to that particular mechanical device which he has claimed for effecting the object he had in view; and if he says it is to be done in one precise and particular way, to that precise and particular way he must be held; and those who have *bona fide* employed a different system and a different way must not be held to have infringed. For this there is the simple reason: if the patentee had made his claim wider, then the patent would be open to objection, because the Legislature requires as a price for those particular privileges

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137] *facts of that case, and read extracts from the judgment of the Vice-Chancellor set out in the note below.]

138] *On applying this exposition of the law, which was adopted by Lord Westbury on appeal (1), to the case be-

that a man should describe the best way of effecting the operation to which he proposes to apply his patent; and if any better way be discovered, subject, of course, to the question of whether that better way can be used until that previous patent has expired, then it is the case of an improvement. If you are to allow him to claim that which is a better way than that which he has described, then he has not given the public the benefit, and is not to claim protection. That seems exceedingly sound reasoning; and although one is not to be too narrow in scrutinizing or interpreting a patent against a person who is a *bona fide* inventor, yet, on the other hand, as to all those who may be proceeding to effect similar objects by other discoveries, the court is bound to say that they are at liberty to do so provided they do not infringe the precise mechanism claimed for by the patentee. This case is really one of a good deal of nicety; but upon the whole, perhaps it does not go beyond *Seed v. Higgins*. I come to the conclusion that this act of Mr. Platt is not an infringement.

* * * * *

I have several times, and purposely, used the word "escapement," because the analogy was present to my mind. There are escapements for clocks and watches almost innumerable, and all of them must have a very great resemblance, and yet many of them have been patented. Everything in the shape of an escapement must *ex vi termini* consist in presenting to and withdrawing from continuous motion something which arrests or allows that continuous motion. That, of course, is what is here—the presentation and withdrawing of a known instrument, the inclined plane and pin (I am taking these to be known, and they are not in question before me); and if I held this to be an evasion, I must hold every new escapement that may be invented for a clock or a watch to be in some kind an evasion of any previous patent for an escapement.

(1) 1864. Jan. 18. The defendants

appealed to the Lord Chancellor (Lord Westbury), who dismissed the appeal. The following passages will be found in his judgment:

In that state of things Mr. Wain, the plaintiff, who appears to be a gentleman of great ability and great ingenuity, applied himself to the construction of what he himself denominates an improvement upon the patent of Lakin & Rhodes. Now, it has been vigorously contended before me that I am not to take Mr. Wain's invention as he himself describes it—that I ought not to allow him to be limited to his own description of its being an improvement—but that I ought to take his invention as containing in itself a new and original principle. He himself has described it and sought protection for it in the character of an improvement. He speaks of it as something supplemental to the original patent, and the language of his patent is such, and the effect of his patent is such, that without the license of the original patentees of Lakin & Rhodes it would not be competent to Mr. Wain to have the benefit of his invention until the patent of Lakin & Rhodes had expired. The object of the contest to give Mr. Wain's invention this extended character is quite plain, because it is desired to take it out of the rule which has been applied in the case in the House of Lords, and very properly applied, and, if possible, therefore to give it the character of having accomplished a result so as to enable the inventor to say that the means for arriving at the same result, though different in form, would be an infringement of his invention. I cannot so take it. I must take Mr. Wain's patent as being specific mechanism, directed to a certain end that was previously well known, directed to facilitate a certain result the benefit of which had long been discovered, directed to produce in a more simple and easy manner a particular operation of the clutch-box, which was itself only a means to an end. The clutch-box is the proximate means of making a

fore me, and *considering the whole of the evidence, [139
I am convinced that the machines made by Clark since the
agreement are not made according to Adie's patent.

*[His Lordship then referred to the judgment of [140

pause in the rotation of the shaft. The mechanism that Mr. Wain describes is the proximate means of making the clutch-box operate for the purpose of making a break in the rotation of the shaft, it is therefore nothing more than a particular means for effecting a given result. That being so, I cannot but think that in patents of that description the doctrine of mechanical equivalents is not by any means applicable. The thing itself is nothing more than a particular agent for attaining a certain end, and if Mr. Wain was entitled to a patent for the particular agency by which he effected in a more convenient manner the opening and shutting of the clutch-box, any person is, on the same principle, entitled to a patent for the means of effecting the same result, provided those means are not a colorable evasion of Mr. Wain's patent, or provided those means do not embody Mr. Wain's patent with an improvement. * * * *

I have already said a word or two upon what I believe to be the doctrine of mechanical agents, and I entirely agree in the conclusion which the Vice-Chancellor has derived from the decision of the House of Lords. If the invention be as I have already described, nothing more than a particular means to attain to a given result which is perfectly well known, then you can no more say that the invention of one distinct set of means interferes with the invention of another than you could say originally that there ought not to be patents for the inventions of distinct means to an end. I would illustrate it familiarly by this example. If we suppose a patent for a ladder to go down a pit, that patent may be made to comprehend all ladders, whether constructed of wood or of iron, or of hemp or of wire, but if another man invented a mode of letting men down the pit by a rope and pulley, it would be impossible to say that the one means of attaining that particular end was to be regarded as identical with or comprehended in the other. * * * *

I have anxiously considered this case, because it is extremely desirable that when a beneficial idea has been started by one man, he should have the benefit of his invention, and that it should not be curtailed and destroyed by another man simply improving upon that idea; but if the idea be nothing more than a discovery of a road to attain a particular end, it does not at all interfere with another man discovering another road to attain to that end any more than that of one man having a road to go to Brighton by Croydon interferes with another man who has a road to go to Brighton by Dorking. They are the roads and means of attaining the end, and unless you can prove that one is a colorable imitation of the other, or bodily incorporates the other with merely an addition, it is impossible to say that they shall not be coexistent subjects of contemporaneous patents.

Now that is the conclusion that I come to in this case. I am sorry to find these inventions in collision, but I am bound to say that merit is due to the second. I am bound also to say that the invention of the one appears to me to have been arrived at originally by a process of thought in which the one did not derive assistance from the knowledge of the other. I must, however, guard myself by remarking that I do not in the smallest degree put my judgment upon what Mr. Platt has sworn, that he knew nothing of Wain's, because if his invention was capable of being accurately represented as an imitation of Wain's, it would be no less an imitation or an embodiment in the eye of the law, if at the time of making his invention Mr. Platt was innocent of any knowledge of Mr. Wain's invention. But I find in Platt's what I consider to be the elements of original thought, taking the materials before him and combining them for a particular purpose. I find in Wain's also the same elements of original thought, and the inventive faculty of the one has led him to one combination, and the inventive faculty of the

the court of Appeal in *Clark v. Adie*(¹), as showing that Clark's clipper was superior to Adie's.]

The last topic urged in behalf of Adie which I feel it requisite to mention was the suggestion that at all events Clark's machines were made in imitation of Adie's. If by imitation is meant external similarity or resemblance more or less, this may be so; but this must of necessity be so in all cases where machines consist of a combination of well-known or long-practised mechanical principles or mechanical contrivances. And whatever may be the similarity, Clark's machine is no more an imitation of Adie's patented invention than it is an imitation of the numerous other preceding machines in which toothed reciprocating cutters moved by handles were used for the purpose of shearing superfluous hair.

There are two points, and two only, which (apart from the arrangement which is the subject of the patent by Adie) appear to present an appearance of novelty in Adie's patent invention. They are the parallel endings of the comb points, and the under plate by which the thickness of the machine may be increased. Neither of these has, as appears by the evidence, been adopted by Clark. The absence from Clark's machines of the two particulars lastly mentioned is apparent to ordinary eyesight, and upon the best consideration I have been able to give to the subject, dealing with the question of fact, which is the only question before me, I have come to the conclusion that the machines made by Clark since the date of agreement are neither an [41] infringement of Adie's patent nor *an adoption of the improvement for which that patent was granted, nor an imitation thereof. The surcharge therefore fails, and must be disallowed.

The plaintiff appealed, and the appeal came on to be heard on the 10th of July, 1876.

Sir *J. Holker*, A.G., Sir *H. Jackson*, Q.C., and *Lawson*, for the plaintiff, contended that Clark's horse-clippers were made according to Adie's patent, and that Clark must account for the profits. He cannot, after all this litigation, and all that has taken place, now for the first time deny that his clippers are made according to the patent.

Kay, Q.C., *Fry*, Q.C., *Aston*, Q.C., and *Everitt*, for the other has led him to another combination, which cannot, in my opinion, be confounded with the first, and therefore I cannot hold that Platt's invention is in any matter whatever to be regarded as the same thing in the eye of the

law as Wain's. I must, therefore, entirely confirm the judgment of the Vice-Chancellor, and adopt the conclusion at which he has arrived, that there is in this case no infringement.

(¹) Law Rep., 10 Ch., 667.

defendant, said that the horse-clippers made by him were not within Adie's patent according to its proper construction. It must be construed so as to be valid, and if the construction now put upon it was true, then the whole patent was void for want of novelty, which the court will strive against. As evidence of this we propose to read the specifications of certain American patents for clipping instruments, which are to be found in the library of the Patent Office.

[This evidence was objected to, but allowed to be read *de bene esse*.]

We must assume that the plaintiff knew of this specification. For many years shearing instruments had been the subject of patents, especially in America, and a copy of a patent in the British Museum has been held to be notice to every one: Hindmarch on Patents (').

No doubt, as a general rule, a licensee cannot dispute the validity of the patent, and we do not use the evidence for that purpose; but if the plaintiff puts a construction upon his patent which brings the machines made by the defendants within the patent, then the patent would be void for want of novelty; the court will therefore not put that construction upon it. The defendant is not to account for horse-clippers generally, but only for those within the patent, and we say that those he has made are not within the specification and drawings.

*July 18. JAMES, L.J., now delivered the judgment [142 of the court (James, L.J., Mellish, L.J., and Baggallay, J.A). After stating the facts of the case and the evidence as to the similarity of the instruments, his Lordship stated that the court had come to the conclusion that the clippers were absolutely identical in design and construction, Clark's No. 2 being Adie's improved and modified in some details, so as to move and work more easily. His Lordship then proceeded: This is met by the defendant in this way. He says, "True it is that if the machine, the horse-clipper produced by the plaintiff, is the thing protected by the patent—if the whole of that is the invention—then there is no denying that Clark's No. 2 is an imitation of Adie's, and no doubt Clark for a long time acted under the belief that Adie's clipper in its entirety was so patented, and that explains the acts and conduct which have been relied on as an estoppel. But he has been since better advised, and now denies, that the patent covers the whole horse-clipper."

And the way that is made out is by producing a volume

deposited in the Patent Office containing descriptions of American patents, and also some prior specifications of English patents.

Of course it is said that as licensee it is not competent to the defendant to dispute the validity of the patent, and it is admitted, therefore, that the documents cannot be used directly to show want of novelty. But they are made available and used in this way. A licensee is entitled to show the limits of the patent, and that he is outside those limits. And in construing a patent this is always to be observed, that you will so construe it as that it shall be a valid and not a void patent. If you construe this patent one way, then the documents produced show that the patent is bad for want of novelty, and you ought therefore to construe it so as to protect it from that conclusion.

The counsel for the plaintiff objected to the admissibility of this evidence, but as it had been admitted and acted on by the Vice-Chancellor we admitted it *de bene esse*. We think, however, that we ought to give our decision on the objection, and we are of opinion that the evidence is clearly inadmissible for the purpose of construing the specification of the particular patent before us.

The admissibility was put on some expressions in the [143] judgment *of the learned judges in the case of *Trotman v. Wood* ('), relating to Trotman's anchors. They are only dicta, because no such evidence was acted on in that case. It was never meant by the learned judges, and it cannot be effectually contended, that there is any principle to be applied to the construction of specifications which differs from that applicable to the construction of every written instrument whatever. Of course in ascertaining the meaning of words used, you endeavor to put yourself as much as possible in the position of the person using them. What a testator knew is commonly resorted to in construing his will. Facts within the knowledge of both the parties to a written contract may be very material in understanding the precise meaning of the expressions used by them. So, in a specification which is addressed by a man having knowledge of the subject to people having also knowledge of the subject, or to that portion of the public who have or may have an interest in it—that which is clearly matter notorious to the world at large—that which is matter within the common knowledge of the trade or of persons conversant with the article, may be resorted to for the purpose of limiting the construction of a specification or of a claim in it to this

(') 16 C. B., (N.S.), 479.

extent, and to this extent only. You assume that a patentee would not be so absurd as to claim that which he knew, and that which he knew everybody else knew, to be old, and you would, if possible, avoid that absurdity, if by any legitimate construction of the words used you could do so.

But this is a very different thing from construing a man's language by the production of a document which, so far as appears, the man never saw or heard of—from construing a specification and claim which is intended for the information of the public by the production of a document which, so far as appears, no one of the public ever saw or heard of.

As used in this case it was not used really for the purpose of assisting in the construction, or of ascertaining what was meant by the patentee in the language he used, but as a device to escape from the clear rule which prevents a licensee from disputing the validity of the patent. What was really attempted to be made out was this: A great part of that which is covered by the patent *is old, and therefore [144 bad; some little part is new, and therefore good; the court will confine the patent to that which is new and good. That device will not succeed. A licensee cannot, under any pretence whatever, bring his licensor into litigation as to the novelty of any part of the patent.

Independently of the aid to the construction supposed to be given by the documents which were so produced, and which we hold to be inadmissible, the defendant has really no case whatever. We think it right to add that, in our judgment, the admission of those documents would not enable us to limit the construction of the claim in the way suggested by the defendant. The defendant's suggestion is, that the only novelties in the plaintiff's instrument are the parallelism of the comb teeth and the use of a second piece of metal to alter the thickness of the comb plate. It is difficult to suppose that any human being could ever have seriously intended to patent such things as the exact parallelism of the teeth of a comb; or the suggestion that a thing might be made thicker, if desired, by placing and fastening an additional piece under it.

We certainly could not depart from the plain words of the specification to attribute a meaning so absurd to the patentee. To hold that the patent is good for that, and that only, would be in effect to hold, at the instance of a licensee, that the patent is good for nothing. To this it may be added that the parallelism and the extra piece are only

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to be found in what the patentee describes as details, which he expressly says may be altered.

We are of opinion that the appellant, the plaintiff, is entitled to surcharge the defendant with all the instruments known as Clark's No. 2, or No. 1, and the matter will go back to Chambers with a declaration to that effect.

Having regard to the mode in which the matter has been controverted, both in the court of the Vice-Chancellor and here, and the possible prejudice to the plaintiff from the decision of the Vice-Chancellor, we think it right to add that we have seen no reason to doubt the validity of the plaintiff's patent as a patent for the horse-clipper described in the specifications, and the drawings thereto annexed.

We have thought it right to deal with and dispose of the [145] case as *it was presented in the court below and here; but there is a question which it is sufficient to indicate, whether the defendant's contention is not precluded by the language of the decree. The words are, "that an account be taken of all machines or apparatus for clipping horses (if any) constructed or arranged according to the said invention or only colorably differing from the machine described in the specification and drawings to the said letters patent, &c., which have been sold by or by the order or for the profit of the defendant," apparently assuming and implying that the machine so described is the invention protected by the patent and covered by the decree.

The plaintiff must have the costs here and in the court below.

Solicitor for plaintiff: *J. H. Johnson.*

Solicitor for defendant: *H. Jarman.*

[3 Chancery Division, 148.]

V.C.M., May 16, 1876.

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*HATTON V. MAY.

[1875 H. 82.]

Purchase of an Annuity—Conditional Limitation—Restraint on Alienation.

A testator directed his trustees to purchase out of his residuary estate from government an annuity for M., a single woman, who was not to be entitled to elect to receive the price or value of the annuity in lieu thereof, and he directed such annuity to be paid to her for her separate use, and that if she should at any time sell, assign, incur, or in anywise dispose of or anticipate such annuity, or any part thereof, the same should cease and be void, and should sink into the residue:

Held, that M. was not entitled to the value of the annuity, but that the annuity was to be purchased by the trustees, and held by them to pay to M. until she should do any act of alienation.

THOMAS MACAULEY, by his will, dated the 26th of July, 1872, gave all the residue and remainder of his property, estate, and effects to George Hatton and Sidney Smith, their executors, administrators, and assigns, upon trust to convert the same into money, and to purchase thereout from government an annuity of £100 sterling for Mary Ann May during her life, and which he gave to her accordingly; and after directing three other annuities to be purchased in the like manner for each of his three daughters, he declared that the said Mary Ann May and his three daughters should not, nor should either of them, nor should their personal representatives respectively, in case of the death of either of them before such purchase, be entitled to elect to receive the price or value of the said annuity in lieu of it; and he declared that all and every the annuities given by his will to Mary Ann May and his said daughters were so given for their sole and separate benefit and disposal as the same should be from time to time payable independently and exclusively of, and so as not to be subject to the control, debts, or engagements of any husband, and to be paid to the respective proper hands of the said Mary Ann May and his said daughters respectively, and their respective receipts given when and as the same respectively became due and payable, to be alone and only proper discharges for the same; and he expressly declared that if any of the said annuitants should at any time sell, *alien, assign, [149 transfer, incur, or in any wise dispose of or anticipate the said respective annuities, or any part thereof, then and in such cases respectively, and immediately thereupon, the same annuity to such annuitant should cease, determine, and be void, and should sink into and become part of the residue of his personal estate and effects. And upon further trust that his said trustees should pay all the residue of his trust moneys, after making such purchases and deductions as aforesaid, and all other (if any) his personal estate, property, and effects, unto the conductor of an orphan asylum therein named, to be applied for the use of such asylum.

By a codicil to his will dated the 26th of July, 1872, the testator appointed Mary Ann May and Sarah Morgan to be trustees and executors of his will jointly with G. Hatton and S. Smith. He died shortly afterwards, and left a considerable amount of property beyond what was specifically bequeathed by his will. All the annuitants were alive. The bill was filed by G. Hatton, S. Smith, and Sarah Morgan, against Mary Ann May for the administration of his

estate, and for a declaration as to the rights of Mary Ann May in respect of her annuity.

The defendant Mary Ann May had required her co-executors, the plaintiffs, to pay her such a sum as would be required to purchase a government annuity of £100 for her life, but the plaintiffs were advised that it was doubtful whether she was entitled to this payment.

E. Cutler, for the plaintiffs: It has frequently been decided that an annuity may be given, with a restriction against alienation. Where there is a gift over, by a direction that the annuity shall fall into the residue, that is equivalent to a gift over to a specified person: *Lloyd v. Branton* (*). In *Shee v. Hale* (*) a condition against alienation by an annuitant was held to be broken by taking the benefit of the Insolvent Act. Your Lordship's decision in *Power v. Hayne* (*) goes fully to the extent that a clause restricting alienation may be validly annexed to an annuity to a [50] person *sui juris* where there *is a gift over. That case is, no doubt, opposed to the opinion expressed by Vice-Chancellor Kindersley in *Day v. Day* (*), but there is no doubt that your Lordship's opinion is in conformity with many of the older authorities. The principle is very clearly laid down in *Woodmeston v. Walker* (*), where Lord Brougham pointed out that if a testator was desirous to give an annuity without the power of anticipation, he could only do so by declaring that the act of alienation should determine the interest of the legatee and create a new interest in another. There can be no doubt what the intention of the testator was in this case, and to allow Mary Ann May to take an actual sum of money sufficient to purchase an annuity which she may at once spend, leaving herself destitute for the future, would entirely defeat the testator's intention.

Speed, for the residuary legatee: The case of *Allen v. Jackson* (*), in which the decision of Vice-Chancellor Hall was reversed by the Appeal Court, confirms the view taken by your Lordship in *Power v. Hayne* (*), and decides in effect that there is no difference in substance between a condition on which the property is to go over on the one hand, and an alternative limitation on the other.

J. Pearson, Q.C., and *Byrne*, for Mary Ann May: The case of *Power v. Hayne* does not apply, as the gift of an annuity was in that case preceded by a life interest, and the

(*) 3 Mer., 108, 117.

(*) 13 Ves., 404.

(*) Law Rep., 8 Eq., 262.

(*) 1 Drew., 569; 22 L. J. (Ch.), 878.

(*) 2 Russ. & My., 197, 204.

(*) 1 Ch. D., 399.

annuitant died in the lifetime of the tenant for life, without having done any act to bring into operation the clause restraining alienation. A gift in the form of that in the present will is subject to a different rule from that applicable to a limitation until bankruptcy or alienation. Such limitations are valid, whereas, in this case, there is an absolute gift in the first instance, which cannot afterwards be cut down: *Ross v. Ross* (¹); *Bradley v. Peixoto* (²); *Rishton v. Cobb* (³). In *Allen v. Jackson* Lord Justice James said (⁴): *—"The gift in the first instance is expressed as a gift [151 to him for life, with a condition defeating it, which may bring it within some of the cases, and perhaps we ought not to appear to overrule them without more necessity for doing so." Therefore his Lordship expressly guarded himself against overruling those cases in which there was first an absolute gift, but that case belongs to a class which have nothing to do with the question. In *Bayley v. Bishop* (⁵), a direction to lay out money in a joint annuity was held to be an absolute bequest of money to the legatee. The only effect this clause can have is to prevent the annuitant from disposing of the capital after the annuity has been purchased.

[They also cited *Barnes v. Rowley* (⁶).]

MALINS, V.C.: The cardinal rule in construing wills is to look at the whole of a will, in order to ascertain the intention of the testator. If the direction to the trustees to purchase an annuity for Mary Ann May had stood alone, it would, according to the authorities, have entitled her to be paid the price for which a government annuity could be purchased; but to ascertain whether that is the effect of the bequest, you must look at the whole of the will, and if you see that such is not the intention of the testator, but that there is an event specified upon the happening of which the annuity is to be cut short, then you must pay the amount to the annuitant so long only as her title to it endures. By the first clause the annuitant gets so much money as will buy the annuity, but the testator subsequently shows his anxiety that this annual sum shall be a personal benefit for her. He says that Mary Ann May, and each of his three daughters, "shall not, nor shall either of them, be entitled to elect to receive the price or value of the annuity in lieu of it;" but notwithstanding that, it has been argued that the annuitant is entitled to have a sum of money in lieu

(¹) 1 Jac. & W., 154.

(²) 3 Ves., 324.

(³) 9 Sim., 615.

(⁴) 1 Ch. D., 404.

(⁵) 9 Ves., 8.

(⁶) 3 Ves., 305.

of the annuity. Then he goes on to direct that all the annuities given by his will "are so given for their sole and separate benefit and disposal, as the same shall be from time to time payable, independently and exclusively of and so as [52] not to be subject to the control, debts, or *engagements of any husband she may marry." If he had stopped there it would have been like the case of *Woodmeston v. Walker* (*). It would have been a gift to the separate use of each annuitant, and Mary Ann May might simply have elected to take the money; but then, in order to carry his intention into effect more fully, he declares "that if any of the said annuitants shall at any time sell, alien, assign, transfer, incumber, or in anywise dispose of or anticipate the said respective annuities, or any part thereof, then and in such cases respectively, and immediately thereupon, the same annuity to such annuitant shall cease, determine, and be void, and shall sink into and become part of the residue of my personal estate and effects." Now, therefore, he has commenced by giving an absolute annuity, but he has declared she shall not take it if she aliens, assigns, transfers, incumbers, or in anywise disposes of it, and if she does, then it is to be void and to sink into the residue.

This is clearly settled, that if you give an annuity till the happening of any specified event, that is the measure of its limitation. It may be cut short by a conditional limitation which abridges the estate. That is distinctly laid down in *Fearne* (*), where the difference is stated between a contingent remainder and a conditional limitation, so that the gift is to her for life, and if she does certain acts, then the interest is to be cut short. That is a conditional limitation, that in case she alienates the annuity it is to be void and to go over. What sort of law is it, then, which says that a testator has no power to prevent an annuitant from having a power of alienation? The case of *Shee v. Hale* (*), which is not by any means the first case laying down the rule, was a bequest of an annuity with a condition that it should fall into the residue upon alienation or insolvency, and the condition was held to be broken in taking the benefit of the Insolvent Act, and the annuity was forfeited.

That rule having been solemnly settled, I have always relied upon it as one of the fixed principles of the law, and I have never known it questioned.

Now, this case is not a new one. The point was argued in [53] *Day v. Day* (*). I need not say that I entertain the

(*) 2 Russ. & My., 197.

(*) Page 10, note h.

(*) 13 Ves., 404.

(*) 1 Drew., 569.

highest respect for the decisions of my learned predecessor, but that case was produced in argument in the case of *Power v. Hayne* (¹), and having carefully looked into the case and fully considered the judgment, and delayed giving my decision, I deliberately came to the conclusion that I could not follow it, because I thought that if the trustees had paid over the value of the annuity to Charles Day, and he had afterwards become bankrupt, they could have no answer whatever to the persons entitled under the gift over. The views I then expressed are to my mind conclusive. That case decides that you can give an annuity with a provision for its going over in case of alienation.

The will says there is an annuity to be purchased, which is to be paid to Mary Ann May for her separate use, and if she commits any act of alienation it is to fall into the residue. What is the difficulty of carrying that direction into effect? My attention was drawn to the case of *Woodmeston v.*

Walker (²) by Mr. Cutler, in which the very same question arose. It is a case I well remember, for I heard all the arguments in it, and they made considerable impression upon me at the time. The case was this: a testator directed that one-third of his residuary estate should be invested in the purchase of an annuity for the life of his sister, who was unmarried, and this annuity he gave to her separate use and independently of any husband she might marry, and without power to sell or assign the same by anticipation. The Master of the Rolls, Sir. J. Leach, refused to order payment to the legatee of the price which would be paid for the annuity, on the ground that the restraint against alienation would be valid in case of future coverture. That decision was reversed by Lord Brougham, who said (³): "If a testator be desirous to give an annuity without the power of anticipation, he can only do so by declaring that the act of alienation shall determine the interest of the legatee and create a new interest in another. There is no gift over in the present case, which is that of a mere naked prohibition, not guarded by any clause of forfeiture." He also previously says, "Where the subject is a personal chattel, it is impossible so to tie up the use and enjoyment *of it as to [154] create in the donee a life estate which he may not alien. Although the object may be attained indirectly, in a manner consistent with the known rules of law, by annexing to the gift a forfeiture or defeasance on the happening of a particular event, or on a particular act being done . . . and upon the happening of the event or the doing of the act a

(¹) Law Rep., 8 Eq., 262.

(²) 2 Russ. & My., 197.

(³) 2 Russ. & My., 204.

new and distinct estate accrues to a different individual." That is exactly what this testator has done. The annuitant is not to have the right to take money instead of the annuity, and it is to be inalienable. Nothing can be better expressed or more consonant with every rule of law. The cases cited by Mr. Pearson, such as *Barnes v. Rowley* (*) and *Bayley v. Bishop* (*), where property was given absolutely, have nothing to do with this question. Such was the case of *Bradley v. Peixoto* (*). There the words were, "I give to my son the dividends arising from £1,620 Bank Stock for his support during his life, but at his decease the bank stock to devolve to his heirs, executors, administrators, and assigns"; and he went on to say that if his son attempted to dispose of the principal such attempt should exclude him from any benefit in his will, and he should forfeit the whole of his share, principal and interest, which should be divided among his other children. The son filed a bill that he might be declared entitled to the bank stock absolutely. The Master of the Rolls said it was laid down as a rule long established, that where there is a gift, with a condition inconsistent with and repugnant to such gift, the condition was wholly void. He considered that the condition in that case was inconsistent with the interest given to the legatee in the stock, and was therefore void. No wonder that was held to be void; if this were a gift to Mary Ann May absolutely I should say the same.

I think the whole case was decided by me in *Power v. Hayne* (*) in a manner I am still quite satisfied with. I decided that case after much consideration. The arguments were heard on the 7th of May, and I took till the 28th before I delivered my judgment, and during that time, as my habit is, I looked into all the cases cited. My decision, therefore, was the result of careful investigation of the authorities, and I desire to be understood as adhering. [55] *to that decision, and repeating the rule of law I there laid down, that in the case of gift to a tenant for life, either to A. until a certain event should happen or for a whole life, with a proviso that it shall cease on the happening of a particular event, the restriction is clearly effectual.

If there could have been any doubt in this case it is removed by *Allen v. Jackson* (*). That is, to my mind, completely in accordance with the rules I have laid down. There a testatrix gave the income of certain property to her

(*) 3 Ves., 305.

(*) 9 Ves., 6.

(*) 3 Ves., 324.

(*) Law Rep., 8 Eq., 262.

(*) 1 Ch. D., 399.

niece and her niece's husband during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again the property should go over. The husband survived his wife and married again. It was there held that this was a limitation to the husband while remaining a widower, that the proviso was valid, and upon the husband marrying again the gift over took effect.

I should take the present case to be a conditional limitation cutting short the first gift. Mary Ann May is not to take the annuity in money and is not to alienate. Mr. Pearson's construction would entitle her to take the whole, so that she might spend the money the day after receiving it, leaving nothing for her support during the remainder of her life.

My opinion is that she is entitled to the annuity only for her life, or until alienation.

The decree will be that an annuity is to be purchased for Mary Ann May in the names of the trustees, and to be paid to her for life or until she shall alien, assign, transfer, incumber, or in anywise dispose of or anticipate the said annuity, or any part thereof.

Solicitors for all parties : *Boulton & Sons.*

[3 Chancery Division, 156.]

V.C.M., May 20, 1876.

***In re BROWN AND SIBLY'S CONTRACT. [156]**

Appointment—Remoteness—General Devise—Trust Estates.

By marriage settlement, dated in 1821, real estate was conveyed to trustees to the use of the settlor, W. M., for life, and after his death to the use of all or any exclusively, of the children, grandchildren, or other issue of W. M. (to be born before the appointment was made), as he should by deed or will appoint, and in default, to the uses therein declared. By will, dated in 1867, W. M. appointed the estate to his son W. E. M. in fee, but in case he should have no child who should attain twenty-one, then to the settlor's grandson W. M. B. in fee :

Held, that the executory gift over to W. M. B. was void for remoteness.

Trust estates held to pass under a general devise notwithstanding a charge of legacies; the devise passing all the real estate vested in the testator whether on trust or beneficially, and the charge affecting only such estate as belongs to him beneficially.

THIS was a summons under sect. 9 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), raising two questions of title. The summons was adjourned into court for argument.

By an indenture of settlement dated the 10th of November, 1821, made upon the marriage of William Metford and

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In re Brown and Sibby's Contract.

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Mary Eliza Anderdon, certain freehold property was conveyed to F. Anderdon, W. P. Anderdon, J. M. Charten, and Joseph Metford, to hold the same to the use of W. Metford for life, and after his decease to the use of M. E. Anderdon for her life; and after the decease of the survivor, to the use of all or any one or more exclusively of the children, grandchildren, or other issue of W. Metford, either by M. E. Anderdon his intended wife, or by any future wife or wives (such grandchildren or other issue to be born before such appointment as thereafter mentioned should be made to him, her, or them respectively) in such manner and form, and if more than one, in such shares and proportions, and for such estate or estates, interest or interests as therein mentioned, and with such limitations over, and to be vested at such age or ages, day or days, and upon such contingencies, and under and subject to such conditions and restrictions, and generally in such manner in all respects as the said William Metford at any time or times, 157] or from time to *time, during his life by any deed or deeds, or by his last will and testament, or any codicil or codicils thereto, should direct, limit, or appoint; and in default of such direction, limitation or appointment, to the use of the child, if only one, or if more than one, then all and every the children of the said W. Metford, either by M. E. Anderdon or any future wife or wives, equally to be divided between them, if more than one, as tenants in common and not as joint tenants, and the heirs of the body lawfully issuing.

By the same settlement certain copyholds were covenanted to be surrendered to the use of the trustees, their heirs and assigns, to hold the same to the uses, &c., therein-before declared concerning the freeholds, or as near thereto as the different tenure would permit.

Mrs. Metford had three children, a son and two daughters; one of the daughters married R. G. Badcock, and died leaving a son, William Metford Badcock.

W. Metford made his will on the 27th of June, 1867, and thereby, in exercise of the power contained in the settlement, appointed, gave, and devised the property therein comprised unto and to the use of his son William Ellis Metford, his heirs and assigns, forever; and the testator proceeded as follows: "And I do hereby request that in case my said son W. E. Metford shall have no child or children who shall attain the age of twenty-one years, that he, the said W. E. Metford, shall and will, by deed or will, grant, appoint or devise that either the said lands and heredita-

ments situate at Burlescombe, or the said customary or copyhold hereditaments at Taunton shall, after the decease of the said W. E. Metford and Caroline Metford his wife, go, remain, and be unto and to the use of W. Metford Badcock, the son of my daughter Eliza Julia Badcock, his heirs and assigns forever."

The testator died in February, 1868.

In 1873 W. E. Metford sold a portion of the property comprised in the before-mentioned settlement to Mr. Brown, who subsequently entered into a contract with Mr. Sibly to sell a part of the property so purchased by him; and a question had arisen as to whether W. E. Metford had an absolute fee simple in the estate, and could make a good title thereto without the concurrence of W. Metford Badcock.

**Joshua Williams, Q.C., and Ingle Joyce*, for the [158 vendor: The executory devise by the will of W. Metford, in favor of W. M. Badcock, is void, as being in contravention of the rule against perpetuities. So far as this rule is concerned, the execution of the power by the will must be read as if the devise had been contained in the settlement of November, 1821. The property was tied up from the date of that settlement. W. M. Badcock was not then living, but was born between thirty and forty years afterwards; and the gift over is one which may not take effect until twenty-one years after the death of W. E. Metford, a person unborn at the date of the settlement, in favor of another person also unborn at the date of the settlement. Such a gift is clearly void, and the gift to W. M. Badcock being invalid, W. E. Metford is absolutely entitled in fee to the appointed property: *In re Edmondson's Estate* (¹); *Stuart v. Cockerell* (²).

Dunning, for the purchaser: The power to appoint in favor of issue is limited to issue coming into existence during the settlor's life; and he has appointed to his son in fee, with an executory gift over in a certain event to a grandson, who was in existence at the death of the settlor. The grandson was an object of the power, and is competent to take, and, under 8 & 9 Vict. c. 106, to dispose of, the contingent estate given to him. In short, the gift over is in favor of a person ascertained within due limits, and competent to deal with the estate given to him.

This makes the case identical with that suggested in *Gilbertson v. Richards* (³); and although that case was af-

(¹) Law Rep., 5 Eq., 389.

(²) 4 H. & N., 277, 297, 298.

(³) Law Rep., 7 Eq., 363; 5 Ch., 713.

firmed in the Exchequer Chamber⁽¹⁾ upon another ground, yet the court expressly stated that there may be considerable doubt whether the rule as to perpetuities applies to a case where the person to take is ascertained within due limits. The case of *Avern v. Lloyd*⁽²⁾ proceeded upon the same ground; and the Court of Appeal in *Stuart v. Cockerell*⁽³⁾ decided the question upon the sole ground that the intention of the testator was to create a class consisting [59] *of persons who were only to be ascertained at a time too remote, and abstained from giving any opinion upon what would have been the case if the class had been ascertainable and ascertained at a time within the limits allowed by the rule against perpetuities.

MALINS, V.C.: The point I have to decide under this settlement is free from doubt. The law is settled, that where a person takes property by virtue of the execution of a special or limited power of appointment, he takes directly under the instrument creating the power. Consequently, when W. Metford made his will, it was the same as if the words he there used had formed part of the settlement, and as if the property had been conveyed by that settlement to trustees to the use of himself for life, with remainder to the use of his (unborn) son in fee, with a direction that in case his son should have no child who should attain twenty-one, then that the estate should, after the son's death, go over to the settlor's grandson in fee. That is an attempt to make the property inalienable for a period which might extend to twenty-one years after the determination of the life of a person not in being at the date of the settlement. The law does not allow a man to tie up property for longer than a life or lives in being and twenty-one years; and this is clearly an attempt to do what is contrary to the law.

I need not do more than refer to my decision in *Stuart v. Cockerell*⁽¹⁾, afterwards affirmed on appeal, which shows that the law is as I have stated it. My opinion, therefore, is that the appointment by the testator to his son in fee is good, and the attempt to give the estate over is void. It is precisely the same as if a man were to give property to his son for life, and after his decease to his son's children, as tenants in common in fee, with a proviso that if any of the children should die under twenty-five the property should go over. In that case the proviso carrying over the shares would be void. The gift to the son in fee is therefore good, and the executory devise over is void.

The second question arose thus: The four trustees of the

(1) 5 H. & N., 463.

(2) Law Rep., 5 Eq., 383.

(3) Law Rep., 5 Ch., 713.

settlement *of 1821 were admitted to the copyholds, [160 and W. P. Anderdon was the survivor of the four. He made his will, dated the 21st of October, 1857, not containing any express devise of trust estates, but commencing, "My property which is not under settlement I give and bequeath as follows;" and after numerous specific and pecuniary legacies, "the rest and residue of my unsettled property, I bequeath to my great nephew J. E. Anderdon. My settled property to be disposed as follows after the death of my wife;" and after other legacies, "my freehold house at Bath I bequeath to my great niece, Blanche Simmons, and to my great nephew J. E. Anderdon I give all the rest and residue of my settled property." And the question was, whether the copyholds vested in the testator as the surviving trustee of the settlement of the 10th of November, 1821, passed to J. E. Anderdon under the gift of "the residue of my unsettled property," or descended to the heir of W. P. Anderdon according to the custom of the manor.

Joshua Williams, Q.C., and Ingle Joyce, for the vendor: The rule is laid down by Lord Eldon in *Lord Braybrooke v. Inskip* (*), that trust estates will pass under a general devise, unless it can be collected from expressions in the will or the purposes or objects of the testator that he did not mean them to pass, and there is no expression in this will to lead to such a conclusion.

The rule was followed in *In re Stevens's Will* (*), and was approved of by your Lordship in *Martin v. Laverton* (*).

Dunning, for the purchaser: Whatever passed to J. E. Anderdon under the gift of "the residue of my unsettled property" was charged with the payment of all the pecuniary legacies which preceded that gift to him: *Greville v. Browne* (*); and *Gyett v. Williams* (*). A general devise will carry trust or mortgage estates unless the disposition of the property made by the testator is such as to show that he is dealing only with that which belongs to him beneficially; a charge of debts or legacies shows that there is no intention to deal with *trust estates, and prevents the court [161 from holding that such estates pass under a general devise: *Doe v. Lightfoot* (*); *Roe v. Reade* (*); *Lord Braybrooke v. Inskip* (*); *Ex parte Morgan* (*); *Dimes v. Grand Junction Canal Company* (*). The case of *In re Stevens's Will* (*) was not a devise of trust estates, but of a mortgaged estate,

(*) 8 Ves., 417.

(*) Law Rep., 6 Eq., 597.

(*) Law Rep., 9 Eq., 563.

(*) 7 H. L. C., 689.

(*) 2 J. & H., 429.

(*) 8 M. & W., 553.

(*) 8 T. R., 118.

(*) 10 Ves., 101.

(*) 9 Q. B., 469.

the mortgage being a subsisting beneficial interest, and the Vice-Chancellor himself treated it as a case in which mortgage estates might be held to pass, whilst trust estates would not pass. The latest authority on the subject is *In re Packman and Moss* ⁽¹⁾, which clearly recognizes that the question is one of intention, to be gathered from the whole will. In the present case, the particular frame and wording of the will point exclusively to property in which the testator was beneficially interested; at any rate there cannot be imputed to him an intention to charge trust estates with the payment of his legacies, or to include trust estates which were so charged in the gift to his great nephew.

MALINS, V.C.: Notwithstanding the decision of the Master of the Rolls in the recent case of *In re Packman and Moss*, I must say that, in my opinion, the inclination of modern times is to hold that the legal estate in trust property passes by a general devise. It is clear that if a man gives all his real estate, his trust estates will pass. Then if another man says, "I give all my real estate, charged with the payment of debts and legacies," what impropriety is there in saying that the trust estates will pass? The rational and convenient course is to say that trust estates pass, but that the charge affects those estates only which belong to the testator beneficially: The substance of the decision in *Lord Braybrooke v. Inskip* is that trust estates pass by a general devise, and the decision of Vice-Chancellor Giffard in *In re Stevens's Will* is consistent with that view of the case. There the testatrix directed her just debts to be paid. She then gave pecuniary legacies, and gave all the [162] *rest, residue, and remainder of her real and personal estate and effects to Jane Tozer for her own absolute use and benefit. The Vice-Chancellor said that was not the case of a mere trust estate, but of the legal estate in a mortgage, the beneficial interest in which mortgage was vested in the testatrix. The charge of legacies was the point insisted on as being a reason why the legal estate in the mortgaged property should not pass. The modern authorities had extended the cases in which the legal estate in a mortgage had been held to pass, and in the case before him he was of opinion that, subject to the debts and legacies, there was an absolute gift to Jane Tozer. He then went on to say: "I do not hesitate to say that in a case such as this, good sense and convenience require that a beneficial gift should carry the legal estate in a mortgage as an incident, and a useful and necessary incident, to the beneficial owner-

(1) 1 Ch. D., 214.

ship." I entirely agree with those observations of the Vice-Chancellor. I quite agree that if a man makes a devise of property to A. for life, and afterwards to another person, then it is quite clear he is only dealing with that which is his own both in law and in equity. That was the true ground of my decision in *Martin v. Laverton* ('). There the testatrix devised and bequeathed all the residue of her property, of whatever description, which she had power to dispose of. The testatrix was mortgagee in fee of an estate which was subsequently sold under a power in the mortgage deed, and I decided that the legal estate in the mortgaged property descended to the heir-at-law. In that case I said that in *Lord Braybrooke v. Inskip* (') it was laid down that the rule always now is, that a general devise will pass the legal estate in mortgage or trust estates, provided the trusts or objects of the trusts are not inconsistent with their passing. The Master of the Rolls said in *In re Packman and Moss* (') that the observation of Lord Eldon in *Lord Braybrooke v. Inskip*, that "the rule is not that in every case where general words are used the property shall or shall not pass, but that in each case you must look at every part of the will for the intention with regard to such property," could not have been present to my mind; but with deference to the Master of the Rolls, I think he over- [163 looked the subsequent sentence which I had seen, namely, this, "that trust estates will pass under a general devise, unless it can be collected from expressions in the will, or the purposes or objects of the testator, that he did not mean them to pass."

I still adhere to what I said in *Martin v. Laverton* ('); and I have no hesitation in deciding that where there is a general devise of real estate charged with debts and legacies, the legal estate in trust property will pass under that devise, notwithstanding the charge, which attaches only on property which the testator is competent to charge with his debts and legacies.

In this case there can be no inconvenience whatever in holding that the legal estate passed, and there is no reason why it should not pass. The testator gives all his property which is not under settlement as follows: [The Vice-Chancellor read the words of the gift]; then he gives various pecuniary legacies, and he gives the rest and residue of his unsettled property to his great nephew, J. E. Anderdon. The property now in question is unsettled property. It is his in a court of law, but not in a court of equity. I

(') Law Rep., 9 Eq., 563.

(') 8 Ves., 417.

(') 1 Ch. D., 214.

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decide that that which is his in law will pass, and that the legal estate in this trust property passed under the words of his will.

Solicitors: *Reed & Lovell*, agents for Reed & Cook, Bridgewater; *Merediths, Roberts & Mills*, agents for Sibly, Bristol.

[3 Chancery Division, 177.]

V.C.M., June 22, 1876.

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[1876 H. 112.]

Consent Order—Motion to discharge—Inadvertence.

A consent given by counsel in the presence and with the sanction of his client may be withdrawn before the order is drawn up, if given through inadvertence, but not so where the matter was fully understood at the time and the client shortly afterwards changes his mind.

THIS was an application by the defendant, George R. Jesse, that an order made on the 18th of May last by consent should not be treated as a consent order, but be now discharged in order that the whole matter might be reheard upon its merits.

The plaintiffs in the action were the committee and members of the Society for the Abolition of Vivisection, which was founded in the year 1875. The defendant was appointed honorary secretary of the society at its formation, and continued so up to the 24th of February, 1876. The statement of claim was to the following effect: Sums of money exceeding £2,000 had been subscribed by various persons in aid of the [178] society, which had been paid into the National *and Provincial Bank of England to the credit of the society. On the 3d of February the plaintiffs wrote to the defendant requesting him to call a meeting of the committee, but the defendant took no notice of such letter. On the 17th of February a meeting of the committee was summoned, and the defendant was required to attend the meeting and produce thereat all accounts, vouchers, and books belonging to the society, and to furnish the committee with an account of his receipts and payments on behalf of the society. The meeting so convened was duly held on the 24th of February, 1876, but the defendant did not attend it, nor did he produce the accounts, vouchers, and books required. At that meeting it was resolved by the committee that the defendant be removed from the office of honorary secretary, and that he be desired not to receive or expend any more moneys

on behalf of the society. A copy of this resolution was forwarded to the defendant, together with a letter requesting him to furnish the committee with an account of his receipts and payments, but the defendant had taken no notice of the communication, and since the date thereof he had continued to insert advertisements in newspapers respecting the society, and had continued to receive and expend moneys as on behalf of the society, and otherwise to hold himself out as the honorary secretary and agent of the society.

The claim against the defendant was that an account might be taken of his dealings and transactions in respect of the matters aforesaid, and that he might be restrained from causing himself to be advertised as the honorary secretary or agent of the society, and from collecting or receiving moneys belonging to the society, and from all further interference with the moneys belonging to or subscribed for the society, and that if necessary a receiver might be appointed.

The action came on for hearing upon motion on the 18th of May, 1876, when the following order was taken by consent: "That the defendant by his counsel submitting to account for all moneys received by him, or by any person or persons on his behalf, for the Society for the Abolition of Vivisection, a balance-sheet be prepared of all receipts and payments on behalf of the society, and such balance-sheet be printed and circulated among the subscribers to the society, and that a general meeting of the subscribers be called *for the appointment of a committee and [179 officers of the society, such meeting to be called with the sanction of the present committee, and the advertisements and circulars relating to such meeting to have attached to them the name of the defendant as honorary secretary to the society. And it was further ordered that Messrs. Frere, Forster & Frere, the solicitors of the defendant, should in the meantime retain in their hands the sum of £1,418 11s. 6d., admitted by the defendant to be subscriptions of the said society under his control. And it was ordered that the costs of this action be paid by the said Messrs. Frere, Forster & Frere out of the said sum, and that the balance thereof remaining after the payment of such costs be paid by the said Messrs. Frere, Forster & Frere to the person or persons who should at the said meeting be appointed to receive the same."

When this order was taken the defendant was represented by counsel, who was instructed by solicitors who were pres-

ent in court, and the defendant was also present. It now appeared that immediately upon leaving court the defendant had objected to the terms of the order, and had informed his solicitors of his objection; that his solicitors had the same day communicated with the plaintiffs' solicitors, and stated to them that the defendant declined to consent to the order.

The present application was made upon the ground that the counsel and solicitors who appeared for the defendant had misapprehended and mistaken their instructions, and were not authorized to give their consent to the terms of the order.

Higgins, Q.C., and *Kekewich*, for the defendant Jesse: The rule of this court is that if a counsel or solicitor consents to any order on behalf of his client, and that consent has been given under a mistake or misapprehension, the client may withdraw his consent at any time before the order is drawn up. In this case it appears that Mr. Jesse had not assented to the terms of the order. It is true he was in court at the time, but he did not understand the full effect of the order which was taken by consent, and immediately upon leaving court he made his objection to the terms of that order.

This rule is laid down in clear terms by the Master of the [180] Rolls *in *Bathurst v. Stanley* (*), where his Lordship says: "There has been a misunderstanding on both sides. Counsel giving up something by mistake may always stop it before the decree or judgment is drawn up. It was a concession made under a misapprehension. Counsel intending to concede one thing conceded another. Before the decree or judgment is drawn up you are entitled to say, 'That is not what I intended to consent to.' The most formal consent may be actually withdrawn before the decree is drawn up, even if no mistake has been made." The same principle was laid down in the well-known case of *Swinfen v. Swinfen* (*). When this order was made the Registrar refused to draw it up without the consent of the defendant, and under the circumstances the right course is that the case should be reheard.

[They also cited *Furnival v. Bogle* (*).]

Glasse, Q.C., and *Bardswell*, for the plaintiffs: There was no mistake or misunderstanding in this case. All the parties perfectly well knew what the order was, and the facts upon which it was made. The order was taken at the

(*) Sol. J., 1876, p. 542; also cited from the shorthand notes.

(*) 2 De G. & J., 381.

(*) 4 Russ., 142.

sitting of the court, and it was not till late in the day that the defendant's objection was communicated to the plaintiffs' solicitors. If there had really been a misapprehension it should have been at once notified to the court. The client is always bound by the consent given by his counsel, in whom a discretion is vested. That was laid down in *Straus v. Francis* (*), where it was held to be within the general authority of counsel to consent to the withdrawal of a juror, and to a compromise of an action, notwithstanding that his client might have dissented, unless his dissent was brought to the knowledge of the opposite party at the time. The case of *Rumsey v. King* (*) was decided upon the same principle.

Higgins, in reply: In *Rumsey v. King* a month had elapsed before intimation was given of the client's dissent, and by upsetting the order it would have involved an order made in another suit. And in *Straus v. *Francis* (*) [18] the action had been partly heard, and witnesses examined, and this would have involved a new trial, and great expenses might have been incurred. Here nothing has been done, and no inconvenience can arise. A client can only be bound so far as he has given his consent.

*MALINS, V.C.: When the motion came on for hearing on the 18th of May, Mr. Jesse had the advantage of being represented by Mr. Kekewich, a counsel of high standing and ability, and by Messrs. Frere, Forster & Frere, solicitors of great experience, and also of high standing. The matter was an exceedingly simple one. It was a matter which to read and thoroughly comprehend did not require the attention of any experienced solicitor or counsel for more than a quarter of an hour. When the motion came forward I remember perfectly well Mr. Glasse rising and telling me the object of the motion. It was then suggested that the order which is now sought to be discharged should be made, and it was made, in the presence of and with the sanction of Messrs. Frere & Co., the solicitors, and of Mr. Kekewich, the counsel of the defendant, and in the presence of Mr. Jesse himself.

Under those circumstances, the order was treated as a consent order. In the course of the same day it seems that Mr. Jesse altered his mind, for I must come to the conclusion that it was not in court, but after he had left the court, that he changed his mind, and I rather collect from this statement of claim that Mr. Jesse is a gentleman who very much likes to have his own way. Here is an honorary secretary

(*) Law Rep., 1 Q. B., 879.

(*) 33 L. T. (N.S.), 728.

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of a society who will not call meetings when the society desires to have them called, who will issue advertisements when the society desires they should not be issued, and when he is asked to attend the meetings of the society he does not attend them; all these things show plainly that he is determined in all things to have his own way. If all these statements are proved, he was as wrong as a man can be, and he was bound at the earliest possible moment to set himself right; he was bound, therefore, if he had issued advertisements which the governing body did not desire to have issued, to abstain from the issuing of them; he [82] *was bound to obey the directions of the governing body, and was bound to act in a manner totally different from that in which it is obvious he had been acting. His counsel and his solicitors, therefore, took a sound view of his case, and he himself in court took a sound view of his case, and he cannot be allowed to set everybody at naught when he comes to this court. By the advice of his counsel, by his own deliberate intention and consent, he submitted to a decree which was a favorable decree to him; because all that it did after stating the affidavits which were read was what no reasonable human being could object to; for it is a decree made in concession to Mr. Jesse. I well remember that Mr. Jesse was very anxious, and it was so stated in his own presence, that nothing should be done which should give the appearance of an affront to him, and, therefore, that although advertisements were to be issued to call new meetings, it was a concession made to Mr. Jesse, that in the advertisements which were to be issued, his name was to be appended as honorary secretary of this society. What, then, was the order to which he submitted? It was this, "The defendant, by his counsel, submitting to account"—and can any honorary secretary tell me that he ought not to submit to account when the body for whom he was honorary secretary desired him to account—"submitting to account for all moneys received by him, or by any person or persons on his behalf, for the Society for the Abolition of Vivisection." [His Lordship read the terms of the order.]

Now, I can only say that this is an order which, if Mr. Jesse did not consent to, he ought to have consented to most cheerfully and thankfully; but I am satisfied that he did consent to it. He was present in court and thoroughly understood it, and he is not, in my opinion, at liberty to withdraw the consent then given. But as much has been said in the course of the argument, and authorities have

been cited about the general principles of the court in withdrawing consents given to orders, I beg to express my opinion, which I believe is in conformity with all the cases that have been cited, that if it shall turn out that by the inadvertence of counsel, by the careless consent of the plaintiff or defendant himself, not fully knowing or considering what he is about, an order given by consent has prejudiced him in a manner which neither he nor his advisers could have anticipated at the time, such *as in the case of [183 *Swinfen v. Swinfen* (¹), where counsel was instructed to do one thing and consented to a totally different thing; that is, for instance, being instructed to make a claim to an estate in fee simple, he consented that the claimant should have a life estate only, or a tenancy for life; that is entirely beyond his authority, and nothing could be more reasonable than that his client should not be bound by such a consent inadvertently given. So, in the case of *Furnival v. Bogle* (²), which has been cited, Lord Lyndhurst expressly puts it on grounds with which I should most heartily concur, and which I should never hesitate for one moment to act upon, in this way: "Mr. Furnival supposed that, on his application, stating that counsel were not authorized to consent to the order, the court would suffer the subject to be again gone into; and he therefore did not, on the former occasion introduce all the circumstances which, it now appears, he might have brought forward. If it had been then shown that counsel, when they exercised their discretion, had not those materials before them on which a correct judgment might be formed, the decision of the court might have been different. It is stated that there is now evidence on affidavit which establishes, or goes far to establish, that point. I therefore think myself bound to suspend the drawing up of the order, till the case can be considered in the new form in which Mr. Furnival wishes to present it to the court; and I do so with the less reluctance, because no inconvenience can arise to the other party from this short delay." The cases which have been cited in the Court of Queen's Bench of *Straus v. Francis* (³) and *Rumsey v. King* (⁴) are cases undoubtedly carrying this doctrine of a client being bound by the consent of his counsel to a very great length. I do not pretend to say to a greater length than is proper, but certainly to the full length to which it can be carried. The client being present, and having full opportunity of knowing what was done, not objecting at the time, it was

(¹) 2 De G. & J., 381.(²) Law Rep., 1 Q. B., 379.(³) 4 Russ., 142, 147.(⁴) 33 L. T. (N.S.), 728.

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held that he could not object to those acts to which his counsel agreed. Therefore, I entirely concur with what the Master of the Rolls has said in the passage which Mr. Kekewich has pressed upon me, and I also would desire [184] to say this, that where *there has been a misapprehension on the part of counsel, where the case has been complicated or difficult, where either the materials have not been sufficiently before the counsel, or being before him, he does not fully comprehend them, or may be excused for not having comprehended them, and consent has been given prejudicial to the client, I should entirely agree with the observation of the Master of the Rolls: "If the counsel says, I made a concession under a misapprehension, it never has been, and I trust it never will be, the course of the court to bind the counsel to that mistake." I say precisely the same thing in precisely the same terms, that if consent has been given under a misapprehension, or from a misstatement, or want of materials, and if all the information which counsel ought to have when he gives a consent is not before him, it never has been the rule of this court, and I also trust it never will be the rule of this court, that the unfortunate client should be bound by such misapprehension. But here, where the whole facts are stated in a page and a half, where the counsel who ask me to decide this do not pretend to say that they were not in possession of every material fact which was necessary to their consent in the case, and the solicitors do the same, and the defendant himself was in the same position, I think if I were to accede to this application it would be a general license to parties to come to this court and deliberately to give their consent, and afterwards at their will and pleasure come and undo what they did inside the court, because on a future day they find they do not like it. It appears to me that this application is altogether groundless and unjustifiable, and I dismiss it with costs.

Glasse, Q.C.: We do not ask for costs, my Lord.

MALINS, V.C.: In that case the application will be refused, but, with the consent of the plaintiffs, without costs.

Solicitors for plaintiffs: *Nisbet, Rooke & Daw.*

Solicitors for defendant: *Frere, Forster & Frere.*

Where the defendants were sued on a written contract, which described them as "the committee for building college buildings at Charlottesville, composed of the following persons," viz., giving their names; and throughout the contract they were spoken of as "the said party of the first part," as

"the committee aforesaid," or as "the said party of the first part."

Held, that it was a contract where evidence *dehors* the contract was most clearly admissible to aid either in fixing a *personal* liability upon the defendants, or in *relieving them from it*.

Where the defendants, in their

answer, set up a defence which in law might have discharged them from *personal* liability, and a stipulation was executed by both the attorneys for the plaintiff and the defendants, which would have the effect to deprive the defendants of such defence, and of other defences: Held, it appearing that the defendants' attorney, at least, mistook the legal effect of the stipulation, and that it was executed under a mistake of law and fact, that it was proper that the defendants should be relieved from it.

The stipulation pertained merely to the conduct of the cause, and was, in fact, a proceeding in the particular

suit, and was under the control of the court, by means of its coercive power over the parties to the suit, and their attorneys. It was a proper case, therefore, for relief on motion: *Becker v. Lamont*, 13 Howard's Pr. Rep., 28, subsequently affirmed, on same opinion, at General Term, 6th District.

To same effect: *Cooper v. Uttoxeter*, etc., 1 Hemming & Miller, 680.

Equity will relieve a party, on a bill in equity, from the consequences of an admission made inconsiderately, or by mistake, under the sanction of an oath, in the course of judicial proceedings: *Leay v. Ferguson*, 1 Tenn. Chy., 287.

[3 Chancery Division, 194.]

V.C.M., July 12, 1876.

*BISHOP V. WALL.

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[1876 B. 280.]

Married Woman—Separate Property—Disposition by Will.

By marriage settlement personal property was assigned to trustees upon trust to pay the income to the wife for her separate use for life, without power of anticipation, and after her decease, in case her husband should survive, to pay him so much of the income as she should by deed or will appoint for his life, and subject thereto for the children of the marriage; and in case there should be no children, then upon trust in case the wife should survive her husband, for her, her executors, administrators, and assigns, for her sole and separate use; but if she should not survive her husband, then for such of her relations as she should, notwithstanding coverture, by deed or will appoint.

The wife made a will in exercise of the power during coverture, and survived her husband without having had issue of the marriage:

Held, upon demurrer, that the will, made during coverture, was a good disposition of all the property.

By an indenture of settlement dated the 9th of December, 1868, made upon the marriage of Christopher H. Barnes and Mary Ann Tabor Wall, certain personal property to which Mary Ann Tabor Wall was entitled was assigned to trustees upon trust to pay the income thereof to and for the separate use of Mrs. Barnes for her life, without power of anticipation; and after her decease, in case the said Christopher H. Barnes should survive, to pay him so much of the income as she should by deed or will appoint for his life, and, subject thereto, to hold the trust property for the children of the marriage as therein mentioned; and in case there should be no children (which event happened) it was declared that the trustees should hold and dispose of the trust property

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upon trust in case Mrs. Barnes should survive her husband in trust for her, her executors, administrators and assigns, absolutely, for her sole and separate use ; but if she should not survive her husband, then upon trust for such one or more of the descendants of the parents of Mrs. Barnes as she should, notwithstanding coverture, by any deed or by will direct, limit, or appoint ; and, in default thereof, upon trust for such person or persons as at the time of the death [195] *of Mrs. Barnes would have become entitled thereto under and according to the statute.

Christopher H. Barnes died on the 25th of February, 1875, leaving his widow him surviving, who died on the 4th of August, 1875, without having again been married.

There were no issue of the marriage.

On the 28th of December, 1874, and during her husband's lifetime, Mrs. Barnes executed a will by which, in virtue of the power given her by the marriage settlement and by virtue of every other power or authority in anywise enabling her in that behalf, she appointed trustees and executors, and gave certain specific and pecuniary legacies ; and as to all the rest, residue and remainder of her estate and effects, and whether in possession, reversion, remainder, or expectancy, and over which she had any power of disposition, she gave, devised, and bequeathed the same to her trustees their heirs, executors, and administrators ; and she directed them to sell and convert into money all her real and personal estate upon trust, after payment of her debts and legacies, to divide the residue thereof into three parts, and pay one of such parts to Philip Wall for his absolute use ; another third part to the children of her sister Ellen Wall, equally between them ; and the remaining third part to the children of her brother Thomas Tabor Wall, in manner therein mentioned.

The plaintiffs, who were the legatees under the will, alleged that the will operated as a good disposition of the property, and they claimed that the trusts of the will, so far as related to the property comprised in the settlement, might be carried into effect ; and also, so far as might be necessary, the trusts of the settlement might be performed and carried into execution ; and that the share and interest of the plaintiffs in the settled property might be ascertained and paid to them and others so entitled.

The next of kin of the testatrix disputed the will, and the question was raised upon demurrer by the next of kin in pursuance of an arrangement between the parties.

C. Howard, in support of the demurrer : It is submitted

that, in consequence of Mrs. Barnes having survived her husband, and died without re-executing her will, it is *inoperative to pass any share, estate, or interest in [196 the settled property to the plaintiffs, and consequently that she died intestate as to such property, which on her death passed to and became the property of her next of kin, and the plaintiffs consequently are not entitled to any part of such property under the will. There are only three ways in which the will of a married woman can be upheld. First, when it is made in pursuance of a power; secondly, when made with her husband's consent; and, thirdly, when disposing of her separate estate. This will was made in exercise of a power given to her only in case of her dying in her husband's lifetime, and there is no allegation that it was made with her husband's consent. She survived her husband, and this event was not within the power, therefore the will should have been re-executed in order to pass the capital of the property which was given to her separate use after the husband's death: *Noble v. Willock* (*).

T. A. Roberts, for the plaintiffs: I admit that a married woman can only make a will where she does so under a power or with consent of her husband, or where she has separate property. This is a case of separate estate. The life interest in the property was settled to the separate use of Mrs. Barnes, and after the death of her husband the capital was settled upon her, her executors, administrators, and assigns, for her separate use, therefore she had the whole property for her separate use, and had the same power as a *feme sole* to dispose of it. This comes within the decision of *Taylor v. Meads* (*), where it was held that a married woman having property settled to her separate use, and not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation by instrument *inter vivos* (not acknowledged under the Fines and Recoveries Act), or by will, and there is no distinction in this respect between an equitable fee and other property. That case was referred to in *Pride v. Bubb* (*).

*MALINS, V.C.: The effect of the settlement made [197 upon the marriage of Mr. and Mrs. Barnes is this: that the trustees are to hold the property upon trust to pay the income to Mrs. Barnes for her separate use for life, and after her decease, if her husband should survive her, to pay him so much of the income as she should by deed or will appoint

(*) Law Rep., 8 Ch., 778; Ibid, 7 H. L., 580.

(*) 34 L. J. (Ch.), 203.

(*) Law Rep., 7 Ch., 64.

for his life, and subject thereto for the children of the marriage, and if there should be no children, then, if Mrs. Barnes should survive her husband, which she did, upon trust for Mrs. Barnes, her executors, administrators, and assigns, absolutely, for her sole and separate use. The result is that she had a life estate in the income for her separate use, and the capital was given to her, her executors, administrators, and assigns, for her separate use. It is settled that where personal property is given to A. for life, and afterwards the capital is given to the executors and administrators of A., the effect is to give the estate to A. absolutely, and it makes no difference that the income is given to the separate use of A. for life, and the capital to A., her executors and administrators, for her separate use, therefore she had the whole for her separate use. Of course she could not dispose of her life estate by her will, but her will, made during coverture, was a good disposition of the whole property, and being a good will during coverture, the fact of her having survived her husband makes no difference, and the will still continues good. The case of *Taylor v. Meads* (1) is, I think, entirely applicable to this case. The demurrer must therefore be overruled, with an expression of opinion of the court that the limitation in the settlement gave the testatrix an absolute estate in the property for her separate use, and that her will was a good disposition of the property.

Solicitors : *Rogers & Chave.*

(1) 34 L. J. (Ch.), 203.

[3 Chancery Division, 198.]

V.C.M., July 11, 12, 1876.

198]

**In re LOVETT.*

AMBLER V. LINDSAY.

[1876. L. 53.]

Administration—Executors who have not proved—Executor de son Tort.

A creditor of a testator brought an action against the executors, who had not proved but had got in part of the assets in Australia, alleging that they had paid some of the legacies, but refused to pay the funeral expenses and debts; and also against other defendants, alleging that they had got in a portion of the assets in England, and that they threatened to dispose of such assets without regard to the debts. The plaintiff claimed as against the executors, administration of the estate and payment of the debts; and against the other defendants he claimed an injunction to restrain them from parting with the assets :

Held, upon demurrer to the claim, that the executors were rightly sued although they had not proved; and that the other defendants were properly made parties as executors *de son tort*.

Rossell v. Morris (1) commented upon.

THIS was a demurrer by the defendants, Messrs. Hunter, Gwatkin & Co., to the following statement of claim:

John Lovett, being possessed of considerable personal estate in Melbourne, made his will and testament, dated the 25th of November, 1872, and after giving certain legacies therein mentioned, he thereby appointed the defendants Samuel J. Lindsay and Peter Facy executors and trustees of his will. J. Lovett died on the 28th May, 1874. The last named defendants (as the plaintiff believes, without proving the will) have by themselves or their agents taken possession of the personal estate of John Lovett in Melbourne aforesaid. The same defendants have in like manner distributed or otherwise disposed of portions of the personal estate in payment of some of the legacies, and have not paid the funeral expenses or any of the debts of the deceased. The defendants Messrs. Hunter, Gwatkin & Co. have got in or received in England, and have now in their possession and control, a portion of the said estate considerably more than sufficient to pay the said funeral expenses and debts. The last named *defendants threaten, and, as the plaintiff [199] believes, intend, to distribute or otherwise dispose of the portion of the said personal estate of the said deceased which has so come to their hands, without regard to the funeral expenses or debts.

The plaintiff is a creditor of John Lovett, deceased, for the sum of £453 11s. due and owing to him for medical attendance and other services performed by him for the deceased, and for moneys paid and expended by him for the funeral expenses of the deceased, and otherwise on his account, under an agreement in writing dated the 1st of December, 1872, and made between the plaintiff and one Samuel Lindsay in that behalf authorized for and on behalf of the deceased. There remains justly due and owing to the plaintiff the said sum of £453 11s., which the defendants, although frequently requested so to do, have neglected and refused to pay.

The plaintiff claimed—

1. Administration in this court of the personal estate of John Lovett, deceased, and for that purpose all proper directions and accounts.

2. Payment out of the said estate to the plaintiff and

(1) *Law Rep.*, 17 Eq., 20.

other the creditors of the deceased of the debts due and owing to them respectively.

3. An injunction against the defendants Messrs. Hunter, Gwatkin & Co., restraining them respectively from parting with the portion of the estate come to their hands except under the direction of this court.

4. Such further or other relief as the nature of the case may require.

J. Pearson, Q.C., and *Romer*, in support of the demurrer: The claim for relief in this case is divided into two distinct branches. The first is a claim against the two executors of the testator, Lindsay and Facy, for administration of the estate; and the second is a claim against the defendants Messrs. Hunters, Gwatkin & Co., that they may be restrained from parting with a portion of the testator's property which has come into their hands. The ground of demurrer upon the first branch of this claim is that the executors have not yet proved the will, and you cannot have 200] a *suit for the administration of an estate without a properly constituted legal personal representative of the testator before the court. This was decided in *Creazor v. Robinson* (*) and *Penny v. Watts* (*); and in the case of *Cary v. Hills* (*) the Master of the Rolls (Lord Romilly) said: "You cannot administer the personal estate of a testator in Chancery unless you have his legal personal representative before the court." The present Master of the Rolls adhered to this view of the law in *Rossell v. Morris* (*), where he decided that if the personal representative is not before the court, no decree can be made in the suit, even though an executor *de son tort* is before the court. These decisions are, no doubt, at variance with your Lordship's decisions in the two cases of *Rayner v. Koehler* (*) and *Coote v. Whittington* (*), but the fact that there have been such conflicting opinions is, at any rate, a ground for hesitation, and is a sufficient excuse for our urging a contrary view to that which your Lordship before expressed.

Then, as to the second ground, it is laid down that you cannot sue a person for misappropriating the assets of a testator without joining in the defence the properly constituted personal representative, and you must charge fraud or collusion between them. This is settled by *Alsager v. Rowley* (*), *Saunders v. Druce* (*), and *Hilliard v. Eiffe* (*).

(*) 14 Beav., 589.

(*) 2 Ph., 149.

(*) Law Rep., 15 Eq., 79, 82.

(*) Law Rep., 17 Eq., 20.

(*) Law Rep., 14 Eq., 262.

(*) Law Rep., 16 Eq., 534.

(*) 6 Ves., 748.

(*) 3 Drew., 140.

(*) Law Rep., 7 H. L., 39.

It is not charged that the defendants are executors *de son tort*, and to make them liable as such, there must be a distinct charge to that effect. There is no charge that they have misappropriated the assets; it is only alleged that they have received assets in England; if so, they hold them for the executors as agents, and no one is entitled to those assets but the executors.

Glasse, Q.C., and Bond Coxe, for the plaintiff: As to the first ground of demurrer, it is distinctly alleged in this claim that the two executors have taken possession of the assets of the testator in Australia, and have misapplied them by paying legacies without paying the creditors; and whether they *have proved the will or not, they may [201 be sued. If they have not proved the will, then they are executors *de son tort*. If executors elect to act, they are liable to be sued before probate. This was held by your Lordship in *Rayner v. Koehler* (*), and again in *Coote v. Whittington* (*), and in the latter case your Lordship fully considered the question, showing what the law has always been. The cases there cited are sufficient to show the fallacy of the arguments for this demurrer. The principle is supported by *Vickers v. Bell* (*), *Cottle v. Aldrich* (*), *Gedge v. Traill*, cited in *Bowsher v. Watkins* (*), *Holland v. Prior* (*), and *Webster v. Webster* (*).

Then, as to Hunters, Gwatkin & Co., it is alleged that they have got into their possession a part of the English assets, and they threaten and intend to distribute or otherwise dispose of such assets without regard to the funeral expenses or debts. It is not alleged that they are acting as agents of the executors, but they have intermeddled with the affairs of the testator in this country, and have got possession of his assets; they are therefore acting in their own wrong as executors *de son tort*. But even if they acted under the authority of the executors, they may be sued jointly with the executors, as in *Cottle v. Aldrich* and *Gedge v. Traill*. The latter case shows that it is not necessary to charge collusion.

It is said that there is no express charge that the defendants are acting as executors *de son tort*, but that is not necessary if you find sufficient allegations to show that they are doing so, and no charges can be stronger than those contained in this claim. What the plaintiff wants is to prevent

(1) Law Rep., 14 Eq., 262.

(2) Law Rep., 16 Eq., 534.

(3) 4 D. J. & S., 274.

(4) 4 M. & S., 175.

(5) 1 Russ. & My., 281 n.

(6) 1 My. & K., 237.

(7) 10 Ves., 93.

Messrs. Hunters, Gwatkin & Co. from parting with the assets in their hands and sending them over to Australia to be dealt with in the manner the Australian assets have been, by an improper payment of legacies in priority to debts.

Pearson, in reply: An executor *de son tort* does not represent the entire estate, and you cannot sue him alone. 202] You cannot have a general *administration with accounts from the death of the testator without the legal personal representative. In *Rayner v. Koehler* (*) the ground of the decision was that the defendant had received all the estate of the testator, and that is not the case here. In *Bowsher v. Watkins* (*) the executor was one of the partners, and the defendants were the whole firm. There was in that case a charge of collusion. The defendant in *Holland v. Prior* (*) was the representative of a deceased representative, and he was made a party because there was privity between them. There is no charge against Hunters, Gwatkin & Co. to establish a case of executor *de son tort*. They have only received money as agents for the executors; there is no case to justify any suit against them. They could have no authority to pay funeral expenses and debts.

It is stated that they have considerably more funds in their hands than would pay the funeral expenses and debts. If so, the court would not prevent legacies from being paid merely because there happened to be some small debts outstanding. There is no dispute here who are the executors, and the only ground for suing without a legal personal representative is when it is uncertain who the executor is, and then you may come to the court for a receiver, but you cannot have a general administration of the estate.

MALINS, V.C.: This case has occupied some time in argument, but the points raised are, in my opinion, free from difficulty. The allegations in the claim, which must be taken for the purpose of this demurrer to be true, are that the defendants Lindsay and Facy were appointed executors of the will of John Lovett, and that, without proving the will, they have taken possession of the personal estate of the testator in Melbourne, and that they have distributed portions of the estate in payment of some of the legacies, and have not paid the funeral expenses or any of the debts of the deceased. Then the allegation against the other defendants, Hunters, Gwatkin & Co., is, that they have got in or received in England, and have now in their possession, a 203] portion of the estate of the deceased *considerably more than sufficient to pay the funeral expenses and debts,

(1) Law Rep., 14 Eq., 262.

(2) 1 Russ. & My., 281 n.

(3) 1 My. & K., 237.

and that they threaten to distribute such portion of the personal estate without paying the funeral expenses and debts.

Now, I must assume that the law of Melbourne is the same as the law of England, and that, if an executor in Australia, taking his testator's assets in his hands to be sufficient for all purposes, paid legacies before debts, and afterwards found the debts to be larger than was expected, the payment of the legacies would be no defence to a creditor suing for payment of his debt.

It is quite true, as Mr. Pearson has said, that where the assets are abundantly sufficient an executor may, on his own responsibility, pay the legacies before he pays the debts of his testator, but he does it at his peril. On the other hand, if an executor pays legacies and refuses to pay debts, that amounts to a *devastavit*. Then the demurrer admitting all the statements in the claim, the case is this—the plaintiff says he is a creditor for funeral expenses and debts, which amount to a sum of £453 11s., and the testator having died two years ago, the executors have paid some of the legacies, and refuse to pay the debts claimed.

As the executors are resident abroad the plaintiff might institute a suit in Melbourne; but that is a course which any one would desire to avoid if possible, and finding that these defendants, Messrs. Hunters, Gwatkin & Co., a well-known firm of solicitors, have assets in this country, no farther off than Lincoln's Inn, it is very natural that the plaintiff should wish to obtain payment of his debts out of those assets. The first and second portion of the prayer is directed to obtaining relief against the executors by means of an administration of the estate in this court, and for payment out of the estate to the plaintiff, and other the creditors of the deceased, of the debts due and owing to them respectively; and the third part of the prayer is for an injunction to restrain the other defendants, Messrs. Hunters, Gwatkin & Co., from parting with the portion of the estate come to their hands, except under the direction of the court.

Now, considering that these allegations are admitted, for the purpose of the demurrer, to be true, and that I have before me executors who can pay and will not pay, surely there is nothing unreasonable in this plaintiff, when he finds assets in Lincoln's Inn *more than sufficient to pay [204 funeral expenses and debts, that he should wish to restrain the defendants from sending those assets over to Australia to the executors who have already, as it is alleged, dealt

with the assets improperly, and have paid some of the legacies in priority to the debts.

The question, then, is, whether this suit can be maintained, first, against the defendants, who are the executors; and, secondly, against the other defendants, who have got the assets in their hands. As to the first point, it is said that the executors have not proved the will, and that a suit cannot be maintained against them on that ground. If that were the law, then it would be permitting persons to take advantage of their own wrong. A man might get possession of the assets of a testator in his character of executor, and might waste them, and be guilty of any misapplication of the funds, and yet he might not be capable of being sued because he had not proved the will. On that subject we are relieved from difficulty by the decision of Vice-Chancellor Stuart in the case of *Vickers v. Bell* (¹), which was affirmed on appeal, where it was held that an executor who had not proved the will was a proper party to an administration suit provided he had acted as executor, though he might not have received anything as such; and *à fortiori*, you may maintain a suit against an executor when he has received part of the assets. The true criterion of the executor's position is whether he is appointed executor, and whether he has meddled with the estate. If he has, then he can be sued without more.

It is distinctly alleged that these defendants, the executors, have interfered with the estate, and have received a portion of the assets, and consequently they are properly made parties to the suit, although they have not proved the will. The executors will, no doubt, have to prove the will, and I feel perfectly sure that, until they have proved, gentlemen standing in the high position of Messrs. Hunters, Gwatkin & Co., as solicitors, will never remit to them the assets in their hands, but will retain them till the executors have clothed themselves with a legal title to receive the funds.

The next question is, whether Messrs. Hunters, Gwatkin & Co. *are properly sued by the plaintiff. It has been argued that they are not sued as executors *de son tort*, because it is not stated upon the claim that they are executors *de son tort*; but that is not necessary, if it appears from the ordinary interpretation of the allegations that they have intermeddled with the estate. It is stated that they, having no authority to do so, have got in or received in England, and have now in their possession and control, a

(¹) 4 D. J. & S., 274.

portion of the estate of the deceased. That is, in my opinion, a sufficient allegation to make those defendants executors *de son tort*, and they can, consequently, be sued in this court as such.

That has, on several occasions, been the subject of discussion before me, and I have thoroughly considered the point. The last occasion of its being argued was in a case of *Coote v. Whittington* (*), which came before me upon appeal from a decision of a county court judge. I am aware that that case was subjected to criticism by Sir George Jessel in *Rowsell v. Morris* (*); and I think, in answer to the observations made by him, I may say that he expressed himself somewhat incautiously, for he decides that you cannot administer an estate in this court without having before it the legal personal representative of the testator or intestate, although an executor *de son tort* or the legal personal representative of such an executor is before the court. If, as he says, you cannot sue a person as executor *de son tort*, then any person may enter upon and take possession of the property of a deceased, and he cannot be sued for doing so. I know of no character in which such a man can be sued except it is that of an executor *de son tort*, as I pointed out in the case of *Coote v. Whittington*. It would be the height of injustice if a man could possess himself of the assets of a testator, and because he did not choose to clothe himself with the character of administrator, could not therefore be sued in respect of such assets.

I have already decided the contrary, first in *Rayner v. Koehler* (*), and then in *Coote v. Whittington*; and I believe that what I decided in those cases has been the rule ever since the statute of Elizabeth.

*Now, I will examine the cases which have been [206 cited, and which, I think, completely bear out what I have said.

The first case is that of *Cottle v. Aldrich* (*), where it was held that although a person cannot be charged as executor *de son tort* while he acts under a power of attorney made to him by one of the several executors who had proved the will, yet, if he continued to act after the death of such executor, he might be charged as executor *de son tort*, though he acted under the advice of another of the executors who had not proved; and Lord Ellenborough there said (*): "Admitting that Denton was rightful executor, yet if the

(*) Law Rep., 16 Eq., 534.

(*) 4 M. & S., 175.

(*) Law Rep., 17 Eq., 20.

(*) 4 M. & S., 177.

(*) Law Rep., 14 Eq., 262.

defendant interfered in an assumed character of executrix, and if, never being executrix, she acted as such, and made claim in that character, may she not be charged as executrix *de son tort*? . . . The question is, has she acted as such? We are not called upon to say what might be the effect of Denton's making probate and confirming all the acts which she has done, but as the case stands at present, she is clothed with no right herself, nor derives any from others who might have assumed it."

Then, in *Sharland v. Mildon* ⁽¹⁾, the widow of the testator employed A. to collect some of the debts due to the testator's estate, which A. accordingly collected and paid over to the widow, believing that she was the administratrix. The widow subsequently died without having obtained letters of administration, and it was held that A., having received moneys which he knew to be part of the estate of the testator, and not having accounted for such moneys to the legal personal representative of the testator, A. was liable to be sued as executor *de son tort*.

In *Gedge v. Traill* ⁽²⁾ the bill was filed by a creditor of a testator against the executor and certain persons who were in partnership with the executor, and it alleged that the partnership claimed to be entitled to retain assets which were in their hands in satisfaction of a debt which they pretended to be due to them from the testator, but it did not charge in express terms that the executor was colluding with his copartners. The creditor was there held to have, under 207] such circumstances, a right to sue all *the partners; and a demurrer by the partners, other than the executor, was overruled. And in *Bowsher v. Watkins* ⁽³⁾ the same principle was maintained.

The last case was *Holland v. Prior* ⁽⁴⁾. There the question was whether the executor of an administratrix who had received assets of her intestate could be made a party to a suit instituted by a creditor of that intestate, and it was held that he might and ought to be made a defendant in such a suit. Lord Brougham, in delivering judgment, said, in speaking of what parties were necessary in an administration suit: "The rule is to stop short at the personal representatives, unless where there is insolvency, or where other parties stand in such relation to the deceased or his estate or his representative, that they may be said either to have been mixed with him and his affairs during his lifetime, or to have aided his representative after his decease in with-

⁽¹⁾ 5 Hare, 469.

⁽²⁾ 1 Russ. & My., 281, n.

⁽³⁾ 1 Russ. & My., 277.

⁽⁴⁾ 1 My. & K., 237, 240.

- drawing his estate from his creditors, or to have undertaken more directly a *quasi* representation of him." Then he says: "Under the second description falls the case of those who by collusion with the executors have received or wasted his property, which may be likened to that of an executor *de son tort*, a representation fixed upon those who intermeddle with the estate as the penalty of their interference."

All these cases prove that where a person does interfere and intermeddle with the estate of a deceased without authority, he may be sued in this court as executor *de son tort*.

There is still one authority remaining, that of *Webster v. Webster* (¹), which I referred to in *Coote v. Whittington* (²). There a plea of the Statute of Limitations by an executor was allowed. The testator died in 1786, though probate was not taken out till 1802. The allegation of the bill being that the defendant had possessed the personal estate, and therefore might have been sued as executor *de son tort* previously to 1792. The Lord Chancellor there admitted he might be charged as executor *de son tort* if it was proved that he had done any act, and thought the plea good upon the circumstances stated in the bill, considering that the defendant had possessed himself of the estate and effects of the testator previously to 1792, and if so, an action might have been brought *at the moment. If an action [208 could be brought, so also could a suit be instituted.

It appears to me, therefore, in the first place, that this claim is properly filed against the executors before probate has been taken out by them, and that these assets being in the hands of Messrs. Hunters, Gwatkin & Co., they may be properly sued on the ground of being executors *de son tort*. Further, as I have said, it is impossible for them to part with these assets until the will is proved, because if they do they will have to pay over again.

Now, the inconvenience of the form in which the defendants have thought fit to bring on the case is palpable. They admit they have money in their hands. I invited them to state what the real facts of the case were; for all I know it may turn out that there is no debt at all, or that the amount of money in their hands is very small, but they have declined to give any information, and have thought fit to defend the case upon these technical grounds. As far as appears by the statements in this claim, I think the plaintiff was quite justified in bringing this action to prevent these defendants from parting with the money without providing

(¹) 10 Ves., 93.

(²) Law Rep., 16 Eq., 534.

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for the debts; and it cannot possibly do any harm to Messrs. Hunters, Gwatkin & Co., whose duty is to pay the money over to those persons who are legally entitled to it. The merits of the case on the part of the defendants are none, and the convenience none. On these grounds I must overrule the demurrer, and the defendants may have fourteen days to put in their answer.

Solicitors for plaintiff: *Kynaston & Gasquet.*

Solicitors for defendants: *Hunters, Gwatkin & Co.*

As to the rights and liabilities of an executor or administrator *de son tort*, see 14 Eng. Rep., 419 note; McClelland's Probate Prac., 82; Browne on Probate, 136, 271; 1 Williams on Executors, 6th Amer. ed., 266-8, 271-3, 405, 926; 3 id., 1787-8, 1728-9, 2018-9; 3 Redf. on Wills (3d ed.), 21-23, 85-6,

106 note; Alexander v. Kelso, 1 Baxter (Tenn.), 5; Damouth v. Klock, 20 Mich., 289.

As to payment to one subsequently appointed executor or administrator being valid, see 4 Eng. Rep., 493 note; 14 id., 419 note.

INDEX.

A.

ACCIDENT.

1. The defendants' ship was driven on shore by a storm in endeavoring to make the port of Sunderland. The crew were taken off with difficulty, and the ship, being a complete wreck, was afterwards driven by the winds and waves against the pier belonging to the harbor, and did damage to it, for which the commissioners brought an action under s. 74 of the Harbors, Docks and Piers Clauses Act, 1847 (10 Vict. c. 27), which enacts that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float, or by any person employed about the same, to the harbor, dock, or pier, or the quays or works connected therewith:"

Held, that the language of the section, though general, must be interpreted with reference to the well-known principle of the common law, that a person is not to be made liable for damage caused by his property, without any default of his, through what is generally termed the act of God; and that the defendants were therefore not answerable under the section. *River, etc., v. Adamson.* 190, 200 note.

ACQUIESCENCE.

See LIMITATIONS, STATUTE OF, 711.
STOCKHOLDERS, 672.

17 ENG. REP.

ACT OF GOD.

See ACCIDENT, 190, 200 note.
CARRIERS, 330, 349 note.
PERFORMANCE, 98, 99 note.

ACTOR.

See PERFORMANCE, 94, 99 note.

ADMIRALTY.

1. The master of a foreign vessel lying in the port of Quebec, being without funds or credit, by means of a bill of exchange drawn upon a firm of shipbrokers in London, procured the advance of a sum of money for necessities for the ship. The bill of exchange was accepted and paid, but the acceptors, not having received the amount of the bill from the shipowners, instituted an action against the ship for the amount of the bill:

Held, that the court had jurisdiction to entertain the action. *The Anna.* 552

2. The commander and crew of a Queen's ship have the same rights to remuneration for salvage as the master and crew of a merchant ship, but

Quære, whether they can make with the captain of the wrecked ship an agreement as to the amount.

3. The commander of a Queen's ship, sent to render help to a wrecked ship, cannot impose terms and refuse to give salvage services unless those terms are accepted.

4. A ship belonging to the Bombay Government with a hired commander and crew is, with respect to the provisions of the Merchant Shipping Act, 1854, s. 484, in the same position as a Queen's ship with commissioned officers. *The Cargo of the Woonung*. 559

5. An English steamship, bound from Sumatra to Jedda, having on board as passengers 550 pilgrims, was wrecked in the Red Sea. The pilgrims took refuge on a rock where if bad weather had set in they would have been exposed to imminent danger. In answer to signals of distress a steamship belonging to the plaintiffs came up, and her master refused to rescue the pilgrims for a less sum than £4,000, which was the amount of the passage money to be paid to the owners of the wrecked vessel for carrying the pilgrims from Sumatra to Jedda. Ultimately the master of the wrecked vessel signed an agreement to pay £4,000 to the master of the plaintiffs' vessel to take the pilgrims to Jedda, and the pilgrims were taken in the plaintiffs' vessel to Jedda in safety. In an action to enforce the agreement:

Held, that the agreement must be set aside as inequitable, and the court awarded £1,800 as salvage remuneration. *The Medina*. 570

6. In a case of collision a steamer will be held not justified in running at full speed on a dark night and not far from a coast where other vessels are likely to be.

7. A vessel, unless there be apparent danger, is not guilty of negligence in not showing a light to a vessel following her. *The City of Brooklyn*. 574

8. Where the judge of the court below has come to a conclusion of fact after hearing witnesses, the Court of Appeal will not, except in cases of extreme pressure, reverse his decision; but where the decision of the court below does not depend upon the credibility of the witnesses, but on the inferences from the evidence drawn by the judge, his decision may, even without such pressure, be reversed by the Court of Appeal.

9. A steamer, with sails up, running through a roadstead ought even by day-time and in fine weather to have a

man on the look-out besides the captain on the bridge. *The Glannibanta*. 577

AFTER-ACQUIRED PROPERTY.

See SETTLEMENT, 706.

AGENT.

See PRINCIPAL AND AGENT, 324, 329 *note*.

AGREEMENT.

1. Defendants, by a contract, dated London, 17th of March, bought of plaintiffs "about 600 tons of Madras rice, to be shipped at Madras or coast for this port during the months of March ^{and} or April, per Rajah of Cochin." The 600 tons filled 8,200 bags, of which 7,120 were shipped between the 23d and 28th of February, and the last bill of lading was signed on the latter day; of the other 1,080 bags, 1,080 were put on board on the 28th of February, and the remaining 50 on the 3d of March, and the bill of lading signed on that day. Defendants having refused to accept the rice:

Held, that, nine-tenths having been completely shipped in February, the rice was not shipped in March or April, and the defendants were not bound to accept it. *Shand v. Bowes*. 133

See ADMIRALTY, 570.

BILL OF LADING, 349, 355 *note*.

BUILDING CONTRACT, 403, 416 *note*.

FRAUDS, STATUTE OF, 789, 797 *note*.

PERFORMANCE, 93, 99 *note*.

AIR.

See NUISANCE, 693, 703 *note*.

ALIENATION, RESTRAINT OF.

See ANNUITY, 814.

ANIMALS.

See CARRIERS, 330, 349 *note*.

ANNUITY.

1. A testator directed his trustees to purchase out of his residuary estate from government an annuity for M., a single woman, who was not to be entitled to elect to receive the price or value of the annuity in lieu thereof, and he directed such annuity to be paid to her for her separate use, and that if she should at any time sell, assign, incur, or in anywise dispose of or anticipate such annuity, or any part thereof, the same should cease and be void, and should sink into the residue:

Held, that M. was not entitled to the value of the annuity, but that the annuity was to be purchased by the trustees, and held by them to pay to M. until she should do any act of alienation. *Hutton v. May.* 814

APPEAL.

See BANKRUPTCY, 731.

APPOINTMENT.

1. By marriage settlement, dated in 1821, real estate was conveyed to trustees to the use of the settlor, W. M., for life, and after his death to the use of all or any exclusively, of the children, grandchildren, or other issue of W. M. (to be born before the appointment was made), as he should by deed or will appoint, and in default, to the uses therein declared. By will, dated in 1867, W. M. appointed the estate to his son W. E. M. in fee, but in case he should have no child who should attain twenty-one, then to the settlor's grandson W. M. B. in fee:

Held, that the executory gift over to W. M. B. was void for remoteness.

2. Trust estates held to pass under a general devise notwithstanding a charge of legacies; the devise passing all the real estate vested in the testator

whether on trust or beneficially, and the charge affecting only such estate as belongs to him beneficially. *Brown's matter.* 821

3. By marriage settlement personal property was assigned to trustees upon trust to pay the income to the wife for her separate use for life, without power of anticipation, and after her decease, in case her husband should survive, to pay him so much of the income as she should by deed or will appoint for his life, and subject thereto for the children of the marriage; and in case there should be no children, then upon trust in case the wife should survive her husband, for her, her executors, administrators, and assigns, for her sole and separate use; but if she should not survive her husband, then for such of her relations as she should, notwithstanding coverture, by deed or will appoint.

4. The wife made a will in exercise of the power during coverture, and survived her husband without having had issue of the marriage:

Held, upon demurrer, that the will, made during coverture, was a good disposition of all the property. *Bishop v. Wall.* 835

APPURTENANCES.

See CROPS, 301, 308 *note*.

ARBITRATION.

1. A lessee covenanted with the lessor that he would keep such a number only of hares and rabbits as would do no injury to the crops, and that in case he kept such a number as should injure the crops he would pay a fair and reasonable compensation, the amount of such compensation, in case of difference, to be referred to two arbitrators, or an umpire. The lessor having brought an action for breach of covenant, alleging that the lessee had not kept such a number only of hares and rabbits as would do no injury, but had kept such a number as did injure, and

had neglected to pay any compensation :

Held, reversing the judgment of the court below, that upon the true construction of the lease the covenant to refer the amount of compensation was a collateral and distinct covenant, and that the action was maintainable, although there had been no arbitration. *Dawson v. Fitzgerald*, 425, 429 note.

See BUILDING CONTRACT, 408, 416 note.
INSURANCE, MARINE, 205, 237 note.

ARCHITECT.

See ARBITRATION, 425, 429 note.
BUILDING CONTRACT, 408, 416 note.

ARRAIGNMENT.

See CRIMINAL LAW, 107, 111 note.

AVERAGE.

See INSURANCE, MARINE, 148.

B.

BALLOT.

See CRIMINAL LAW, 113.

BANKRUPTCY.

1. An adjudication of bankruptcy was made, founded upon the execution by the debtor of a bill of sale which was held to be an act of bankruptcy :

Held (affirming the decision of Bacon, C.J.), that the holder of the bill of sale was entitled to appeal from the adjudication.

2. Statement of the principles which guide the court in determining whether an assignment of all a debtor's property

is an act of bankruptcy. *Ex parte Ellis*. 781

See CHATTEL MORTGAGE, 434.

BILL OF LADING.

1. The defendants sold to B. & Co. 100 tons of zinc (unappropriated) upon certain terms of payment, giving them at the time of the contract four several documents to the following effect : " We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc off your contract of this date." Upon the faith of these documents, the plaintiffs bought of B. & Co., and paid for, fifty tons of the zinc mentioned in the contract. B. & Co. having failed, and the contract price being unpaid, the defendants refused to deliver the zinc :

Held, that the giving of these delivery orders or " undertakings " did not estop the defendants from setting up, as against the vendees of B. & Co., their right as unpaid vendors to withhold delivery. *Farnelos v. Bain*. 849, 855 note.

BONDS.

1. All the bonds issued by corporation, secured by mortgage to be paid *pari passu*. *Matter of Regent's Canal, &c.* 784

BROKER.

1. The defendant, being in want of additional capital in his business, on the 10th of June, 1873, wrote to the plaintiffs (accountants in London with whom he had been in correspondence on the subject) as follows : " The premises of the B. works in this town are my property solely, but the business of it is carried on by myself and my partner. In case of your introducing a purchaser of all the premises, or part of them, of whom I shall approve, or in case of your introducing capital which I should accept, I could pay you a commission of 5 per cent. on the

amount in either case, provided no one else is entitled to a commission in respect of the same introduction." The plaintiffs succeeded in introducing one W. to the defendant, who advanced him by way of loan a sum of £10,000, upon which the plaintiffs received the agreed commission. Some few months afterwards the defendant and W. entered into an agreement for a partnership, on which occasion W. made a further advance of £4,000 by way of capital to the concern. The plaintiffs claimed commission upon this further advance; and, in an action brought to enforce their claim, they admitted that the advance of the £4,000 was not contemplated at the time of the advance of the £10,000, but that the £4,000, was advanced solely in consequence of the negotiation for the partnership between the defendant and W.: *Held*, that the plaintiffs were not entitled to commission on this second advance. *Tribe v. Taylor.* 389

BUILDING CONTRACT.

1. A building contract by which the plaintiffs contracted with the defendants to construct a dock and other works in connection therewith, provided as follows: "Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works, as hereinafter mentioned, to the satisfaction of the engineer, his contract shall, at the option of the company but not otherwise, be considered void as far as relates to the works or maintenance remaining to be done; and all sums of money that may be due to the contractor, together with all materials and implements in his possession and all sums named as penalties for the non-fulfilment of the contract, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract." The contract provided that "the whole of the works should be entirely completed on or before the 31st of August, 1878." The works were not completed by that date.

2. There were other clauses in the contract in the following terms:

"If the contractors shall not complete the said works within the period limited for the purpose, or if they shall become bankrupt, or if from any cause whatever (not arising from any acts done or omitted to be done by the said company contrary to the true intent and meaning of these presents) they shall be delayed or prevented in the completion of the said works according to the specification, it shall be lawful for the company, without any previous notice, to take the works entirely or in part out of their hands, and to employ any other contractor to complete the same."

"Should the engineer be at any time dissatisfied with the nature or mode of proceeding with, or at the rate of progress or maintenance of, the works, or any part thereof, he shall have full power to procure and make use of all labor and materials from the money that may then be due or that may become due to the contractor, but it is hereby expressly declared that the possession of this power by the engineer shall not in any degree relieve the contractor from his obligation to proceed in the execution of and complete the works with the requisite expedition or to maintain them as hereinafter mentioned."

3. On the 22d of January, 1874, and consequently after the time fixed by the contract for completion of the works, the defendants gave notice to the plaintiffs to avoid the contract and thereupon took possession of the works and of the materials and implements of the plaintiffs:

Held, that upon the true construction of the contract the clause above set forth, with reference to the avoidance of the contract and the forfeiture of the contractors' implements and materials, could only be enforced before the time originally fixed for completion of the works had expired. *Walker v. London, etc.* 403, 416 note.

C.

CARRIERS.

1. The plaintiff having been a passenger by the defendants' railway, her lug-

gage (consisting of two packages) was deposited with a clerk of the defendants, at their cloak room; and the person depositing it received a ticket which was headed "Luggage and cloak office," and on the face of which was printed, in type easily legible, "left, subject to the conditions on the other side. This ticket to be given up when the luggage is taken away." And on the other side, after a statement of this "sums to be paid for warehousing passengers' luggage," there was a notice that "the company will not be responsible for loss of, or injury to, any package beyond the value of £5, unless at the time of the delivery of such package the true value and nature thereof . . . shall have been declared, . . . and a sum at the rate of 1d. per pound sterling . . . be paid . . . in addition to the before-mentioned ordinary warehouse charges. The company will not be responsible for loss of, or injury to, articles except left in the cloak room." The value of each package was more than £5, but no declaration of value or additional payment was made. The person who deposited the luggage knew that there were conditions on the back of the ticket, but did not know what those conditions were. The luggage was not put by the defendants' servants into the cloak room, but was left in a vestibule, without any other protection, and was stolen owing to this negligence of the defendants' servants. On these facts, the court having power to draw inferences:

Held, that the luggage must be taken to have been deposited subject to the conditions on the back of the ticket.

2. *Held*, by Blackburn and Mellor, JJ., that the conditions were applicable to the loss, and protected the defendants, although the luggage was not deposited in the cloak room.
3. But by Lush, J., that the contract was to warehouse the luggage in the cloak room, and that the conditions only protected the defendants as to a deposit in the cloak room. *Harris v. Great Western, etc.* 156, 174 note.
4. The plaintiff took a ticket for Scarborough at the defendants' station at Liverpool. The journey from Liver-

pool to Scarborough is via Leeds and York. The defendants' train only goes to Leeds; and from Leeds to Scarborough the journey is over the lines and by the trains of other companies. The ticket referred to the conditions in the defendants' published time bills, of which the most material part was as follows: "The published train bills are only intended to fix the time at which passengers may be certain to obtain tickets for any journey from the various stations, it being understood that the trains shall not start before the appointed time. Every attention will be paid to insure punctuality, so far as it is practicable; but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. . . The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party."

The train by which the plaintiff travelled was too late at Leeds to catch the train by which the plaintiff should have proceeded to York; and when the plaintiff did arrive at York, at about 7 p.m., he found that the train for Scarborough which he should have caught had gone, and that the next train for Scarborough did not start till 8 p.m., arriving at about 10 p.m. He thereupon took a special train from the North Eastern Company, which arrived at Scarborough between 8.30 and 9 p.m. The plaintiff had no business or engagement in Scarborough necessitating his being there at any particular time.

The plaintiff brought an action against the defendants in the county court, and the county court judge held that there was a contract on the defendants' part to use due diligence to insure punctuality, and that, upon the facts, there had not been such diligence used. He

also held that the plaintiff was entitled to recover the cost of the special train on the authority of the dictum of Alderson, B., in *Hamlin v. Great Northern Ry. Co.* (26 L. J. (Ex.), 22), that "where one party to a contract does not perform it, the other may do so for him as near as may be, and charge him for the expense incurred in so doing."

On appeal to the Court of Common Pleas, that court affirmed the judgment of the county court judge. On appeal from that decision to the High Court of Appeal:

Held (reversing the decision of the Common Pleas), that the county court judge was wrong in acting on the dictum above mentioned as an absolute rule. The principle is, that if one party does not perform his contract, the other may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing; and a proper test of what is reasonable in such a case as the plaintiff's is to consider whether, according to the ordinary habits of society, a person delayed on his journey, under circumstances for which the company were not responsible, would have incurred the expenditure in question on his own account:

5. *Held*, also, by the majority of the court (James and Mellish, L.JJ., Baggallay, J.A., and Mellor, J.), that the words "Every attention will be paid to insure punctuality as far as practicable" did import a contract to use due attention to keep the times specified in the time bills as far as practicable, having regard to the necessary exigencies of the traffic and circumstances over which the company had no control.
6. Per Cleasby, B.: The effect of the conditions was that the company declined to enter into any contract as to the times specified in the time bills, whether absolute or qualified.
7. Per Baggallay, J.A.: The contract in the conditions was such as to protect the defendants from any further liability in a case where they issued a through ticket than they would have incurred if they had only issued a ticket to the farthest point of the journey on their own system.

8. Per James, L.J.: The true meaning of the contract was, that the persons in the management of the train would, with regard to the particular train on that particular journey, use due attention to insure punctuality, but that the defendants were not to be held responsible for delays arising from circumstances unconnected with the management of the particular train. *Le Blanche v. London.* 248, 284 *note*.

9. The defendant, a common carrier by sea from London to Aberdeen, received from the plaintiff a mare to be carried to Aberdeen for hire. In the course of the voyage the ship encountered rough weather, and the mare received such injuries that she died. The jury found that the injuries were caused partly by more than ordinary bad weather, and partly by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the defendant's servants:

Held, reversing the decision of the court below, that the defendant was not liable for the death of the mare.

10. The carrier does not insure against the irresistible act of nature, nor against defects in the thing carried itself; and if he can show that either the act of nature or the defect of the thing itself, or both taken together, formed the sole direct and irresistible cause of the loss, he is discharged. In order to show that the cause of the loss was irresistible it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented.
11. Per Cockburn, C.J.: A shipowner, who is not a common carrier, is not subject to the liability of a common carrier—i.e., does not insure the goods bailed to him for carriage.
12. The question what amounts to an "act of God" within the meaning of that expression, as applied to the carrier's exemption, discussed. *Nugent v. Smith.* 330, 349 *note*.

See RAILWAY COMPANY, 298, 299 note.

CASES OVERRULED, REVERSED
AND CONSIDERED.

- Alexander v. Vanderzee, 3 Eng., 379, *distinguished*. 138
 Allen v. McPherson, 1 H. L. Cas., 191, *followed*. 771
 Baxendale v. London, etc., 12 Eng. R., 496, *followed*. 395
 Bradshaw v. Lancashire, etc., 12 Eng. R., 310, *questioned*. 238
 Brown v. Brown, 8 Ell. & Bl., 876, *followed*. 453
 Butler's will matter, L. R., 16 Eq., 479, *followed*. 800
 Castro v. Murray, 13 Eng. R., 358, *followed*. 144
 Collins v. Lewis, L. R., 8 Eq., 708, *followed*. 801
 Cossey v. London, etc., L. R., 5 C. P., 146, *followed*. 357
 Dawkins v. Rokeby, 14 Eng., 127, *see* 144
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- Oakley v. Pasheller, 4 Cl. & Fin., 207, 10 Bligh, N.S., 548, *distinguished*. 175
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 Quick v. Quick, 3 Swab. & Tr., 442, *overruled*. 453
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 Regina v. Churchwardens, L. R., 9 Q. B., 317, *affirmed*. 1
 Richardson v. Great, etc., 18 Eng. R., 343, *reversed*. 299
 Roberts v. Bury, etc., L. R., 4 C. P., 755, *distinguished*. 403
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 Rowsell v. Morris, 7 Eng., 646, *considered*. 839
 Skinner v. Great, etc., 16 Eng. R., 462, *followed*. 357
 Southwell v. Bowditch, 16 Eng. R., 447, *reversed*. 324
 Tompkins v. Colthurst, 1 Ch. Div., 626, *followed*. 801
 Trotman v. Wood, 16 C. B., N.S., 479, *considered*. 805
 Wall v. Bright, 1 Jac. & W., 494, *explained*. 594
 Wataga, The, Swab. Adm., 163, *followed*. 552
 Wild's Case, 6 Coke Rep., 16 b., *followed*. 589

CHANCERY.

See EQUITY, 771, 778 *note*.

CHANGE OF POSSESSION.

See CHATTEL MORTGAGE, 434.

CHARGE.

See LEGACY, 801, 803 *note*.

CHATTEL MORTGAGE.

1. Under the terms of an unregistered bill of sale of goods, given to secure a debt, the grantor was to be allowed to remain in possession of the goods until default in payment of the debt after demand. Default having been made, the grantee became entitled under the bill to take possession of the goods, and accordingly demanded them from the owner of a house in which the grantor had placed them, and threatened to take them by force. The grantor, however, remained in possession of the goods until she filed a petition for liquidation :

Held, reversing the judgment of the Court of Exchequer, that the fact that the grantee was entitled to and demanded possession did not take the goods out of the grantor's possession within the meaning of 17 & 18 Vict. c. 36, and that the trustee in liquidation was entitled to the goods as against the grantee.

2. *Held*, also (though not necessary for the decision), that if the grantor had bailed the goods with a bailee to hold on account of the grantor, the goods would still have been in the possession of the grantor within the act, and would not have been taken out of the grantor's possession by the fact that the grantee was entitled to and demanded possession. *Ancona v. Rogers*.

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COLLISION.

See ADMIRALTY, 577.

COMMISSIONERS.

See BROKER, 389.

CONDITION.

See ANNUITY, 814.
LEGACY, 721, 729.

CONDITION PRECEDENT.

See PERFORMANCE, 93, 99 *note*.

CONSIDERATION.

See NOVATION, 757, 765 *note*.

CONTRACTOR.

1. By agreement between the Smithfield Club and the defendants, who were proprietors of a building and premises at Islington called the Agricultural Hall, the club were to have the exclusive use of the hall during the period of their annual show of stock, &c., the defendants providing and paying a sufficient staff (who were to be under the sole control of the secretary and stewards of the club), to receive, take care of, and redeliver the stock, &c., exhibited, and also paying the club £1,000; in consideration of which the defendants were to receive certain fees or admission money from the visitors. The stock and articles to be exhibited were received at the gate of the defendants' premises by one Sharman (upon orders signed by the secretary of the Smithfield Club), who contracted with the defendants for a lump sum, amongst other things, to receive them and to redeliver them at the end of the show upon like orders; the defendants in no way interfering. One Stilgoe, who exhibited a pen of three sheep at the show in 1873, sold them to the plaintiff; and upon the plaintiff's drover producing an order for their removal signed by Stilgoe, Sharman or one of his men delivered him by mistake sheep from another pen. These the plaintiff rejected, and he brought this action against the defendants for converting his sheep:

Held, by Grove and Archibald, JJ., —Lord Coleridge, C.J., doubting,—that the defendants were not responsible under the circumstances for the acts or defaults of Sharman or his men.

2. Affirmed on appeal,—the Court of Appeal holding that, as between the plaintiff and the defendants, there was no privity of contract, and no duty on

the part of the latter to redeliver the stock, &c., at the close of the show. *Goslin v. Agricultural, etc.* 387, 380 note.

CORPORATIONS.

1. By an agreement made between the vendor of certain ironworks and W. and H., it was agreed that, if W. and H. succeeded within three months in getting up a company for the purchase of the ironworks at a valuation, they should, out of the purchase-money, receive £1,500. By an agreement dated a few weeks later, the vendor agreed with W., as trustee for the company, that the company should buy the ironworks at a valuation. W. and H. did not get up a company within the three months, but after some time they formed a company with seven shareholders, who were also the directors. These shareholders were not informed of the agreement to pay W. and H. the £1,500. The company was registered, and by the articles of association the agreement for the purchase of the property at a valuation was adopted, and it was provided that the directors should pay all expenses incurred in getting up and registering the company. Very few other shares were applied for: none were allotted, and the company was wound up.

W. and H. claimed in the winding-up remuneration for their services both before and after the company was formed, and the valuer claimed his charges for valuing:

Held, that, though W. and H. might not have a legal claim as to services before the formation of the company, they would have had a good equitable claim, so far as the company derived benefit from them, and would have a legal claim as to services rendered after the formation of the company. But

2. *Held*, that the concealment of the agreement as to the £1,500 constituted a fraud, and that as the shareholders had been by fraud induced to join the company, and as the company had received no benefit from the services of W. and H., they could not claim from the company remuneration for those services:

3. *Held*, that any claim which the valuer

might have was against W. and H. only. *Matter of Hereford, etc.* 644, 649 note.

See STOCKHOLDERS, 631.
ULTRA VIRES, 784.

COSTS.

See DAMAGES, 395, 401, note.
SECURITY FOR COSTS, 617.

COUNTER CLAIM.

See SET-OFF, 381.

COVENANT.

See ARBITRATION, 425, 429 note.
LANDLORD AND TENANT, 429, 432 note.

CREDITOR.

1. When annuity to cease as to. *Hutton v. May.* 814

CRIMINAL LAW.

1. *Bigamy.* Upon an indictment for bigamy it was proved that the first marriage was solemnized, not in the parish church of the parish, but in a chamber in a building a few yards from the church, while the church was under repair. It was further proved that divine service had several times been performed in the building in question:

Held, that the building must be presumed to have been licensed, and therefore the first marriage was valid, and the prisoner was properly convicted of bigamy. *Regina v. Cresswell.*

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2. *Deaf and dumb.* A deaf mute being tried for felony, was found guilty, but the jury found also that he was incapable of understanding, and did not understand, the proceedings at the trial:

Held, that he could not be convicted, but must be detained as a non-sane person during the Queen's pleasure. *Regina v. Berry.* 107, 111 note.

3. *Elections.* A prosecution having been instituted against a deputy-returning officer, who had presided at a booth during a municipal election, for offences under the Ballot Act, 1872 (35 & 36 Vict. c. 33), a county court judge, in the exercise of jurisdiction given by sched. 1, part II, rule 64 of the act, made an order directing the town clerk of the borough to produce and show, for the purpose of the prosecution, certain rejected ballot papers, counterfoils, counted ballot papers, and spoilt ballot papers relating to the same polling station, and to open the sealed packets containing those documents, and the marked copy of the register, and to take all such proper means as he should deem necessary in order that the mode in which any particular elector had voted should not be discovered; and further ordered that no person should be allowed to see the face of the counted ballot papers. At the trial of the indictment against the prisoner, charging him with having fraudulently placed papers purporting to be, but to his knowledge not being, ballot papers in the ballot box, Blackburn, J., allowed the counterfoils and marked register produced under the aforesaid order to be given in evidence, and the face of the voting papers to be inspected so as to show how the votes appeared to have been given:

Held, that this was rightly done. *Regina v. Beardsall.* 118

CROPS.

1. Growing crops are not personal chattels within the Bills of Sale Act.
2. A contract in writing for the sale of personal chattels, if the property passes by the contract, is a transfer or assurance of personal chattels within the Bills of Sale Act. *Branton v. Griffiths.* 301, 308 note.

CUL DE SAC.

See HIGHWAY, 289, 293 note.

D.

DAMAGES.

1. When from failure to send telegraphic message too remote. *Sanders v. Stuart.* 286.
2. The plaintiff contracted with a Tramway Company to construct a tramway for them in a public road, and made a sub-contract with the defendants (an asphalt company) under which the latter undertook to lay the asphalt and too keep it in good repair and condition for twelve months. In consequence of the defective state of the asphalt within that period, one H., who was driving along the road, was thrown out of his cart and injured. H. thereupon brought an action against the Tramway Company, who gave notice to the plaintiff. The plaintiff then called upon the defendants to defend H.'s action, but they declined to have anything to do with it. The plaintiff resisted H.'s claim, and ultimately compromised it for £70, but was obliged also to pay £40 for the costs of H.'s attorney, and expended £18 more for the costs of defending the action. The jury found that the course taken by the plaintiff in resisting and ultimately compromising H.'s action was a reasonable and proper one:

Held,—upon the authority of *Bazendale v. London, Chatham and Dover Ry. Co.* (Law Rep., 10 Ex., 35; 12 Eng. Rep., 496),—that the defendants were liable for the £70, but not for the £40 or the £18, these latter charges not being "the natural or necessary consequences" of their default, the contracts between the plaintiff and the Tramway Company and between the plaintiff and the defendants being separate and independent contracts. *Fisher v. Val de Travers.* 395, 401 note.

See MORTGAGE, 778.

DE SON TORT.

See EXECUTORS AND ADMINISTRATORS, 838, 848 note.

DEAF AND DUMB.

See CRIMINAL LAW, 107, 111 note.

DEED.

See INFANT, 121, 129 *note*.

DEVISE.

See APPOINTMENT, 821.

REAL ESTATE, 594, 614 *note*.

DISCOVERY.

1. The mere fact that letters are written to the plaintiffs' solicitor "in confidence" and under a pledge not to disclose their contents to any one but the plaintiff and his legal advisers, affords no defence to an application for an order to inspect them. But, if they are not merely confidential communications, but are written in answer to inquiries by the plaintiff's solicitor with a view to and in contemplation of anticipated litigation, they are privileged. *McCorquodale v. Bell*. 357

2. A bill was filed against a banking company to compel them to replace a sum of money alleged to have been improperly transferred by them from one account to another at their branch bank in Oregon. Before the bill was filed, but after litigation had become highly probable, the manager in London telegraphed to the manager in Oregon to send full particulars of the whole transaction. On an application by the plaintiffs in the suit for production of documents, the bank resisted production of the letter sent in answer, as being privileged:

Held (affirming the decision of the Master of the Rolls), that the letter was not privileged, and must be produced.

3. Under the Judicature Acts the right to discovery is regulated by the rules previously existing in the Court of Chancery. *Anderson v. Bank, etc.* 656

DIVORCE.

See JURISDICTION, 442.

DOMICILE.

See JURISDICTION, 442.

E.

EASEMENT.

See MINES, 88, 92 *note*.

ELECTIONS.

See CRIMINAL LAW, 118.

EMBLEMENTS.

See CROPS, 301, 308 *note*.

EMINENT DOMAIN.

See MORTGAGE, 778.

PATENT, 24, 50 *note*.

EQUITY.

1. When a court of equity cannot entertain suit to set aside will as fraudulently procured. *Meluish v. Milton*, 771, 778 *note*.

ESTATE TAIL.

See WILL, 589.

ESTOPPEL.

See FOREIGN JUDGMENT, 309.

FORMER SUIT, 238, 246 *note*.

EVIDENCE.

1. When declarations competent to establish lost will. *Sugden v. St. Leonards*, 453, 543 note.

See PATENT, 805.

PRINCIPAL AND SURETY, 175, 183 note.

EXECUTORS AND ADMINISTRATORS.

1. A creditor of a testator brought an action against the executors, who had not proved but had got in part of the assets in Australia, alleging that they had paid some of the legacies, but refused to pay the funeral expenses and debts; and also against other defendants, alleging that they had got in a portion of the assets in England, and that they threatened to dispose of such assets without regard to the debts. The plaintiff claimed as against the executors, administration of the estate and payment of the debts; and against the other defendants he claimed an injunction to restrain them from parting with the assets. *Ambler v. Lindsay*, 838, 848 note.

See MORTGAGE, 778.

REAL ESTATE, 594, 614 note

SET-OFF, 881.

WILLS, 450.

F.

FIXTURES.

See CROPS, 801, 808 note.

FOREIGN JUDGMENT.

1. The presumption with regard to the judgment of a foreign court is that it is correct according to the law of the country to which it belongs, but when it was admitted by the parties that the law of the foreign tribunal had not been correctly declared by its judgment:

Held, that such judgment was not binding on an English court. *Meyer v. Ralli*, 809

FOREIGN WILLS.

See WILLS, 450.

FORFEITURE.

See LANDLORD AND TENANT, 429, 432 note.

FORMER SUIT.

1. Claim, stating that plaintiff was administratrix of her husband, L., who, being a season-ticket holder, was received by the defendants, a railway company, at their station to be conveyed as a passenger, and by their negligence was injured, and in consequence unable to attend to his business from that day to the day of his death, and incurred expenses, &c. Defence, first, denying specifically all allegations in the statement relating to the injury to the deceased and the damage arising from it. And, secondly, that after the death of L. the plaintiff, as his administratrix, for the benefit of herself, as his wife, and of his children, sued the defendants in respect of the injury caused to them by his death, and recovered damages. Reply, that the defendants were estopped from denying the facts relating to the accident, as in the previous action they had pleaded, not guilty, and that L. was not received by them as a passenger, and those issues were found by the jury in the plaintiff's favor:

Held, on demurrer, first, that the second action was not barred by the judgment and satisfaction under the first; secondly, that there was no estoppel of which either party could take advantage, as the plaintiff sued in a different right in either action. *Leggott v. Great Northern, etc.*

238, 246 note.

See FOREIGN JUDGMENT, 809.

FRAUD.

See CHATTEL MORTGAGE, 434.
STOCKHOLDERS, 672.

FRAUDS, STATUTE OF.

1. W. entered into a verbal agreement with A. to sell him an inn called the Lion Inn for £950. On the following day W.'s solicitor wrote to A.'s solicitor: "W. has been with us to-day, and stated that he had arranged with your client A. for the sale to the latter of the Lion Inn for £950. We therefore send herewith draft contract for your perusal and approval":

Held (reversing the decision of Malins, V.C.), that this letter was not such a note or memorandum of an agreement as is required by the Statute of Frauds. *Smith v. Webster.* 789, 797 note.

G.

GOOD-WILL

See MORTGAGE, 778.

GOVERNMENT.

See PATENT, 24, 50 note.
PETITION OF RIGHT, 148.

GUARDIAN.

See INFANT, 717.

H

HEALTH.

See TRESPASS, 356.

HEIR.

See REAL ESTATE, 594, 614 note.

HEIRLOOMS.

See JURISDICTION, 710.

HIGHWAY.

1. A way ceases to be a "public highway" where the access to it at either end has become impossible by reason of ways leading to it having been legally stopped up. *Bailey v. Jamieson.* 289, 293 note.

HUSBAND AND WIFE.

1. A wife after being divorced from her husband cannot sue him for an assault committed upon her during coverture.

Declaration, that the defendant assaulted and beat the plaintiff. Plea, that at the time of the committing of the grievances, &c., the plaintiff was the wife of the defendant. Replication, that before suit the marriage of the plaintiff and the defendant was dissolved by the absolute decree of the Court for Divorce and Matrimonial Causes. On demurrer:

Held, that the replication was bad: for that the action did not lie, as the wife's inability to sue did not arise merely from the necessity of joining her husband in an action for an assault, but from the rule that husband and wife are one person in law. *Phillips v. Barnet.* 100, 105 note.

See APPOINTMENT, 835.

I

ILLEGAL RESTRAINT.

See LEGACY, 721.

IMPROVEMENTS.

See INFANT, 717.

INADVERTENCE.

See MISTAKE, 828, 834 *note*.

INCIDENT.

See MORTGAGE, 778.

INCOME.

See ANNUITY, 814.
WILLS, 650.

INFANT.

1. Upon the true construction of 2 Geo. 2, c. 22, s. 18, and 9 Geo. 4, c. 14, s. 5, a set-off cannot be maintained of a debt, contracted by the plaintiff during infancy and not ratified by him in writing after full age. *Rawley v. Rawley*.
121, 129 *note*.
2. The court has power, under 11 Geo. 4 & 1 Will. 4, c. 65, to sanction a building lease of an infant's freehold estate when he is seised in fee simple in reversion after a life estate by the curtesy vested in his father. *Matter of Letchford*.
717

INSANE PERSON.

See LUNATIC, 798, 800.

INSANITY.

See CRIMINAL LAW, 107, 111 *note*.

INSURANCE, MARINE.

1. In an action on a policy on the ship *Jessie* "at and from Mazagan to the United Kingdom," it appeared that the ship arrived at Mazagan on the 27th of December, 1873, and that the last news the assured, the plaintiff, had of her was a letter from her captain, dated the 9th of January, 1874, and received on the 21st of January, in which the captain said he had had a fine passage out and had commenced loading, but was delayed by bad weather, and would write again before sailing. The ship had, it afterwards appeared, lost an anchor by bad weather while at Mazagan, and the captain had made a protest on the 3d of January, but he did not mention the fact in this letter. The plaintiff insured on the 27th of February without communicating to the underwriters the letter of the 9th of January, but through his brokers gave them this information: "I do not know when she sailed, I have not had the sailing letter yet." The *Jessie*, after leaving Mazagan, was lost by the perils insured against. At the trial the sole defence relied upon was that the non-disclosure of the letter was the concealment of a material fact, and avoided the policy.

The judge left to the jury the questions: 1. Was the ship an overdue ship at the time of the insurance? 2. Was any material fact concealed, and, if so, what? 3. Was there any misrepresentation, and, if so, was it fraudulent? The jury answered all the questions in the negative, and a verdict was entered for the plaintiff:

Held, on a rule for a new trial on the ground of misdirection, and on a motion to enter judgment for the defendants, on the ground that the loss of the anchor was a particular average loss under the policy which ought to have been communicated, and that the plaintiff was responsible for the neglect of the captain in not communicating it, first, that judgment could not be entered for the defendants, as the point as to the anchor had not been distinctly taken at the trial, and, if it had, questions relating to it ought to have been left to the jury; and, secondly, on the authority of *Gladstone v. King* (1 M. & S., 38), that the particular average loss was an exception out of the policy, but the innocent non-communication of it

by the agent of the assured did not avoid the policy; but that there must be a new trial, for it did not appear that the question had been distinctly put to the jury whether the contents of the letter of the 9th of January, and the fact that it was the last letter from the ship, would have influenced the mind of a reasonable underwriter, if communicated. *Stribley v. Imperial*, etc. 148

2. The defendants were a limited company for the mutual insurance of ships belonging to members. By the articles of association: 4. No person shall become a member until he shall have signed the articles. 28. The business of the company shall be managed by directors. 39. The directors shall have full power to determine all disputes arising between the society and members concerning insurances or claims upon the society; and the decision of the directors shall be final and conclusive, as well upon the society as the members; and no member shall be allowed to bring any action or suit against the society for any claim upon the society, except as is provided by these presents; and the directors may, if they think fit, cause any of such claims, and the amount to be paid to any member, to be referred to the decision of an average adjuster, and his decision shall be final and conclusive on the society and claimant, and no appeal shall be allowed therefrom. 40. Two directors specially authorized and the chairman shall alone have power to sign and execute all policies approved by a board of directors. 63. If any member sell any vessel insured by the society, the purchaser of such vessel, if not a member, shall have no claim upon the society; and if a member, he shall have no claim until the vessel be entered in his name on the books of the society. 83. In all cases of any vessel insured by the society being lost or damaged, the owner, master, or mate or crew, shall, as soon as possible, give notice to the secretary of the society, who shall summon the board; and the directors shall proceed to examine the owner, master and mate, and such of the crew as they may think necessary, as to the cause of the loss or damage, and shall make such decision as in their judgment the case may require. 84. If any member is dissatisfied with the decision

of the directors as to the settlement of any loss or damage sustained by him, and such member shall procure ten members, not being directors, to join in a requisition to the directors to reconsider their decision, a board of not less than ten directors shall reconsider such decision.

In December, 1868, the plaintiff became equitable mortgagee of the ship H., D. being registered owner. In January, 1869, D. insured the vessel with the defendants, directing the policy to be made out in plaintiff's name; this was not done, but the policy was forwarded by the defendants to the plaintiff. The policy was headed with the name of the defendants' society, and after giving details as to the rates of insurance, &c., and referring to one of the rules or articles, at the bottom was: "March, 1869. This is to certify that Mr. D., as ship's husband for the H., whereof is master at present, time D., has this day paid £17 10s. for the insurance of fifty-two shares on the said vessel. Value of ship as per rule for this class, £7 10s. per ton, £1,215." The policy was duly signed by the chairman and two directors. In January, 1870, the ship being on a voyage, the plaintiff applied in his own name for a renewal of the policy, and paid the premium, and a policy was forwarded to the plaintiff by the defendants, which was precisely like the former, except that the plaintiff's name was inserted as the ship's husband. No copy of the rules was ever given to the plaintiff, and he had no knowledge of the provisions until after the loss of the vessel. In March, 1870, a call was made on the plaintiff in respect of the H. for the losses of the society for the year 1869, and plaintiff paid it. Another call was made and paid in October, 1870. In May, 1870, the H. was registered in plaintiff's name, but no notice was given of this to the defendants. In November, 1870, the H. was wrecked and became a total loss. The plaintiff sent in his claim, and on the 6th of January, 1871, D., who was master at the time of the loss, attended a meeting of the directors at their requisition, and they, having heard his account of the wreck, resolved that it was not found that the H. was lost by perils of the sea, and that the owners had no claim upon the society. No notice of this meeting or of the resolution was given to the plaintiff. On the 6th

of April, 1871, a notice signed by ten members, but not signed by the plaintiff or D., was sent to defendants' office, and at the next quarterly meeting of the directors, no notice to attend having been given to plaintiff or D., the directors, without further inquiry, confirmed the former resolution. In an action brought by the plaintiff against the defendants to recover the amount of his insurance, in addition to the above facts, it was admitted by the defendants that the H. was a total loss by perils of the seas; the court having power to draw inferences of fact:

Held, in the Court of Queen's Bench (by Blackburn, Mellor, and Lush, JJ.),—1st. That the policy sufficiently specified the particular risk or adventure within the meaning of 30 & 31 Vict. c. 23, s. 7. 2d. That defendants were precluded from saying the plaintiff, who was the owner of the ship, was not a member of the society after having accepted an insurance and taken premiums and other payments from him. 3d. That the fact that the plaintiff turned his equitable interest into a legal interest after the policy was renewed by him did not bring the case within art. 63. But 4th. That defendants were entitled to judgment: for that the contract was contained in the policy and any of the articles applicable; and that article 39, which regulated the manner of the payment under the policy, did not exclude the jurisdiction of the courts of law, but made it a condition precedent to bringing an action that the loss of the particular member should have been first decided upon by the directors, subject to the appeal given by article 84.

3. The Exchequer Chamber reversed the judgment of the Queen's Bench.

4. By Amplett, B., on the ground, that, if the investigation by the directors had been properly conducted the action could not have been maintained; but that the conduct of the directors, by adjudicating against the plaintiff's claim without hearing him, or giving him an opportunity of being heard, was not binding on the plaintiff; and that, under the circumstances, the defendants could not take advantage of the wrong done by their agents by setting up as a defence that the determination of the directors in favor of the plain-

tiff was a condition precedent to bringing the action, and that an actual loss being admitted, the plaintiff was entitled to recover the amount.

5. By Kelly, C.B., and Brett, J., on the ground that such of the articles as were applicable must be read with the policy, and that articles 39, 83, and 84 were intended to prevent the insured from maintaining any action or suit at all in the ordinary courts in respect of any dispute arising on the policy; and that, therefore, the articles were invalid, and did not prevent the plaintiff from maintaining the action.

6. Archibald, J., and Pollock, B., were of opinion that the judgment ought to be affirmed, on the ground taken by the Queen's Bench.

7. *Held*, also, by Archibald, J., and Pollock, B., and *semble*, by Kelly, C.B., and Brett, J., that the policy was valid within 30 & 31 Vict. c. 23, s. 7. *Edwards v. Aberayron, etc.* 205, 237 note.

8. The expenses which may be recovered by the assured under the suing and laboring clause in a policy of insurance free of particular average, are confined to the expenses which are necessary to avert a total loss, for which the insurer would be liable.

9. A sale of the subject-matter of insurance ordered by a foreign tribunal within whose jurisdiction it has been originally thrown by perils insured against, does not amount to a constructive total loss where the sale is not due to perils insured against, such perils having ceased to operate, but is made for the purpose of repaying advances incurred through the captain's breach of duty in not transhipping the subject-matter of insurance to its destination.

10. A cargo of rye, shipped on an Austrian ship for carriage from Enos, a Turkish port, to Schiedam, was insured by a policy warranted free of particular average. The ship meeting with stormy weather, a portion of the cargo was damaged, and the ship had to put into the port of La Rochelle. Proceedings were taken, at the instance of the captain, in the Tribunal of Commerce at that port, and, in consequence, the cargo was landed and

warehoused. It was necessary to sell a portion of the cargo immediately, which was accordingly done. On the 21st of February the court, on the petition of the captain, ordered a sale of the residue, and notice of abandonment was given to the defendants as insurers on the ground that, in the opinion of the experts or surveyors, the rye could not be forwarded to its destination. This notice the defendants refused to accept; and on the 5th of March the defendants, as insurers, summoned the captain before the Tribunal of Commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye.

11. The court accordingly ordered the residue of the rye to be surveyed, and the surveyors reported that it could be reshipped and conveyed to its destination. This report was confirmed by the court, and notice of it given to the assured, together with notice that any course pursued with the cargo would be for their account and on their responsibility. The rye, however, was not forwarded, and remained until December warehoused at La Rochelle, although the captain might have procured a ship to carry it on. The captain having in the meantime procured advances to meet the expenses caused by the interruption of the voyage, was summoned, by the parties who had made the advances, before the Tribunal of Commerce; and on the 14th of September the court decreed a sale of the ship, and a statement of general and particular average of, the ship and cargo to be drawn up, which was accordingly done. On the 21st of December the Tribunal of Commerce decreed the sale of the rest of the cargo, on the ground that the weather was unfavorable for its preservation. On the 25th of January the Tribunal of Commerce decreed that the full amount of the freight due upon the whole voyage was chargeable upon the proceeds of such sale; and an amended average statement, which proceeded on this footing, was confirmed by the court. If the proportion of freight so payable was to be added to the extra expenses incurred in respect of the residue of the cargo so sold by reason of the interruption of the voyage, including the extra freight in respect of forwarding to the port of destination, the amount would exceed the value of the rye at the port

of destination. It was admitted that neither the law of France or Austria was in accordance with the decree of the 25th of January, and if the proper proportion of freight had been charged to the residue of cargo sold, the value at the port of destination would have exceeded the expenses:

Held, that there was no constructive total loss of the cargo; inasmuch as the decree for the sale of the residue of the cargo was not due to the perils insured against, but was made for the purpose of paying advances incurred through the captain's breach of duty in not forwarding such rye to its destination; and the insurers were not concluded by the judgment of the French court from denying that there was no total loss, because it was admitted that such judgment was erroneous according to the law which it professed to administer. *Meyer v. Ralli*. 309

J.

JOINT STOCK COMPANY.

See PARTIES.

JUDGMENT IN REM.

See FOREIGN JUDGMENT, 309.

JURISDICTION.

1. A woman, having been deserted by her husband, who went to reside in the United States of America, acquired a *bona fide* domicile in England, and instituted a suit for dissolution of marriage against him by reason of his adultery and desertion. The original place of domicile of marriage and of matrimonial cohabitation of the parties was in Jersey, and the adultery proved was committed there. The husband had never had or acquired a domicile in England:
Held, that even if the petitioner, without a sentence of judicial separa-

tion, could acquire a distinct domicile in this country, she could not make her husband amenable to the *lex fori* of her new domicile. *Le Sueur v. Le Sueur*. 442

2. The court has jurisdiction to order a sale of heirlooms apart from the land to which they are attached for the purpose of paying off mortgages, and will do so at the instance of a tenant for life where satisfied that it will be for the benefit of the parties interested that they should be sold, even where there are infant tenants in tail in remainder. *Fane v. Fane*. 710

See ADMIRALTY, 552.

FOREIGN JUDGMENT, 309.

L.

LACHES.

See LIMITATIONS, STATUTE OF, 711.
STOCKHOLDERS, 672.

LANDLORD AND TENANT.

1. By a lease of a public house made after the Licensing Act, 1874, came into operation, the lessee covenanted not to "do, omit, or permit, or suffer to be done or omitted, any act, matter, or thing whatsoever that can or may affect, lessen, or make void either or any of the licenses for the time being granted to the public house." The lease contained a clause for forfeiture on breach of covenant. The lessee having committed on the same day three offences against the Licensing Acts of 1872 and 1874, was convicted of two of them by justices, who directed, under the act of 1874, s. 13, that the convictions should not be recorded on any of the lessee's licenses. The lessor having brought an action against the lessee to recover possession of the public house on the ground of forfeiture, and for damages for breach of covenant:

Held, affirming the judgment of the Exchequer Division, that the licenses were not "affected" within the mean-

ing of the covenant, and that there was no breach of covenant. *Wooler v. Knott*. 429, 432 note.

LEGACY:

1. A testator bequeathed a fund to trustees upon trust, after the determination of a life interest, to pay and transfer the trust property equally among the female children of his sister on their attaining twenty-one or marrying with the consent of their parents. At the death of the tenant for life the testator's sister was a widow and had two daughters, the elder of whom afterwards married while under age, with the consent of her mother:

Held, that the class to take must be ascertained when the first member became absolutely entitled to a share:

2. *Held* (reversing the decision of the Master of the Rolls), that the consent mentioned in the will must be taken to be that of the parents or parent if any, and that the daughter who had married with the consent of her surviving parent took a vested interest in the fund. *Dawson v. Oliver-Massey*. 721

3. A testator directed his trustees to pay the income of his real and residuary personal estate to his wife for life, and on her death to apply the income in the maintenance of his children then living and the issue of his children then deceased (such issue taking the share which their parents would have taken if living) until his youngest surviving child attained twenty-one, and when such child attained twenty-one, to sell the real estate and hold the proceeds and the personal estate in trust for his children then living and the issue then living of his child or children dying before that period. The youngest child attained twenty-one twelve years before the widow's death:

Held (affirming the decision of the Master of the Rolls), that the class was not to be ascertained before the death of the widow, and that the legal personal representatives of a child who had died without issue in her lifetime took nothing.

4. Where the effect of postponing the vesting of the shares of children to the

period of division would be to leave the family of a child dying before that period without provision, the court leans strongly in favor of early vesting; but where a testator provides for all his issue living at the period of division, his words will not be strained in order to make the shares vest at an earlier period. *Deighton's Estate, Matter of.* 729

5. Where there is a bequest of pecuniary legacies and devises of real and residuary real estates, and an insufficient amount of personalty for the payment of debts, the pecuniary legacies must be first resorted to to make up the deficiency. *Farquharson v. Floyer.* 801, 803 note.

See WILLS, 650.

LEX LOCI

See FOREIGN JUDGMENT, 309.
JURISDICTION, 442.
MARRIAGE, 72, 86 note.
WILLS, 450.

LIEN.

1. A packer is entitled to a general lien on the goods of his customer which are in his hands. *Matter of Witt.* 586

LIFE ESTATE.

See JURISDICTION, 710.
WILL, 589, 650.

LIGHT.

See NUISANCE, 693, 703 note.

LIGHTS.

See ADMIRALTY, 574, 577.

LIMITATION, CONDITIONAL.

See ANNUITY, 814.

LIMITATIONS, STATUTE OF.

1. Money paid into court under the Lands Clauses Act for purchase of land which was subject to an equitable mortgage by deposit, with a memorandum undertaking to give a legal mortgage; on petition by the mortgagee for payment out:

Held, that the analogy of the Statutes of Limitation applied, and that only six years' arrears of interest could be charged. *Matter of Stead's Estate.* 711

See PETITION OF RIGHT, 143.

LOST WILL.

1. How proved and how established. *Sugden v. St. Leonards.* 453, 543 note.

LUNATIC.

1. A lunatic was tenant for life of the advowson of a rectory and other real estate. Under the order of the court a lease of the property for ninety-nine years, if the lunatic should so long live, had been made to two persons at a large rent. This lease had become vested in the administrator of the survivor of the two lessees, the administrator being also the first tenant in tail in remainder expectant on the death of the lunatic without issue male. The lunatic was aged eighty-two, and had never had any issue. The administrator wished to sell the next presentation to the rectory, and petitioned the court, as protector of the settlement, to consent to the barring of the entail of the advowson so far as might be necessary for effecting the proposed sale:

Held, that, as the application was not for the benefit of the lunatic's estate, but only for the benefit of a collateral, the court ought not to interfere. *Matter of Tharp.* 798

2. A fund in court in a lunacy, the lunatic being dead, represented land in settle-

ment. A deceased tenant in tail had created a base fee:

Held, that the fund could not be paid out to the persons claiming through him, except upon the production of a deed enlarging the base fee. *Matter of Reynolds*. 800

M.

MANDAMUS.

1. A writ of mandamus is a prerogative writ, and not a writ of right, and the granting of it is, in that sense, discretionary. The exercise of this discretion cannot be questioned, but the grant of a peremptory mandamus is a decision upon a right, declaring what is and what is not lawful to be done, and such decision is subject to review.
2. The 5 Geo. 4, c. 36, s. 1, gives to church-wardens and overseers of parishes the power to borrow money from the Public Works Loan Commissioners for the purpose of building or repairing churches, &c., and gives the commissioners the power to make loans to them for such purposes. It then confers on the church-wardens the power to make rates for the repayment of such loans, "by annual or half-yearly instalments within the period of twenty years, at farthest, from the advancing of any such sums respectively."

Held, that after the expiration of the twenty years the church-wardens and overseers had no power to make a rate for the purposes of paying money borrowed under the act, and that, consequently, a mandamus commanding them to do so could not be sustained.

3. The 15th section of 19 & 20 Vict. c. 104, does not affect this matter.
4. A power of that sort given in any particular act must be exercised in exact accordance with the authority given, and the restrictions imposed, by the act itself.
5. *Per LORD HATHERLEY*: The power given in the 5 Geo. 4, c. 36, s. 1, to the Public Works Loan Commissioners to

regulate the mode and proportions of a rate for the payment of a loan made by them (a power which must be exercised in a reasonable manner), would prevent the loss of the last instalment, though it might not become actually due until the end of the twenty years.

6. *Per LORD O'HAGAN*: The Legislature having given ample authority and facilities for making the rates so as to secure payment of the loan within the time limited, has created an implication that it did not mean to allow the making of any rate after that time had passed. *Regina v. Church-wardens, etc.* 1, 19 note.

MARRIAGE.

1. *Per LORD SELBORNE*: Habit and repute is not a mode of constituting but of proving a marriage; and when a true and undivided habit and repute is shown, a presumption of the marriage arises by the law of Scotland.
2. *Per THE LORD CHANCELLOR*: The presumption of marriage is much stronger than the presumption in regard to other facts.
3. When a matrimonial ceremony took place in Scotland, the parties being ignorant of an impediment, afterwards removed, and when, believing themselves to be validly married, they lived together continuously for years as husband and wife, and were regarded as such by all who knew them, the marriage was held to have been established by the force of habit and repute, without any proof of mutual consent by verbal declaration.
4. It must be inferred that the matrimonial consent was interchanged as soon as the parties were enabled, by the removal of the impediment, to enter into the contract.
5. The *onus* of rebutting a marriage by habit and repute is thrown on those who deny it.
6. *Per LORD CHELMSFORD*: The ceremony which took place, although invalid, was undoubtedly a consent by the parties.

to live together as husband and wife. And their subsequent cohabitation was a proof of continued consent. *De Thoren v. Attorney-General*.

72, 86 note.

See CRIMINAL LAW, 106.

MARRIED WOMEN.

See APPOINTMENT, 835.

HUSBAND AND WIFE, 100, 105 note.

MARSHALLING ASSETS.

See LEGACY, 801, 803, note.

MASTER AND SERVANT.

1. The defendants had on their premises gates which were safe when open and wedged up, but liable to fall when closed. The attention of the manager had been directed to the unsafe condition of the gates, and orders had been given, but not carried out, to remedy this. The plaintiff, a workman in the employ of the defendants, passed through the gates when open, but on his return one of them was closed, and shortly afterwards, while he was working near the gates, they fell on and injured him. There was no evidence to show how this happened, nor any evidence that the manager and other persons employed by the defendants were incompetent:

Held, that the defendants were not liable, as the plaintiff had not shown that the persons employed by the defendants were incompetent, and the negligence, if any, which caused the accident was that of a fellow workman of the plaintiff. *Allen v. The New Gas Co.* 420

See CONTRACTOR, 367, 380 note.

PATENT, 24, 50 note.

MINES.

1. Case in which three grants of land, reserving the minerals, but each re-

servation varying in substance and expression, were held to have respectively secured, and not to have secured, a right to carry outside minerals underneath and through the land granted.

Remarks by Lord Chelmsford and Lord Selborne as to the question whether the rights reserved were rights of property, or rather in the nature of privileges, servitudes, or easements. *Ramsay v. Blair*. 88,

92 note.

MISTAKE.

1. A consent given by counsel in the presence and with the sanction of his client may be withdrawn before the order is drawn up, if given through inadvertence, but not so where the matter was fully understood at the time and the client shortly afterwards changes his mind. *Holt v. Jess*. 828, 834 note.

MORTGAGE.

1. The owner of business premises mortgaged them with the machinery and fixtures. A railway company gave notice to take part of the premises for their railway, but before the price was fixed the mortgagor died, and the mortgagees entered into possession of the property. A suit was instituted for the administration of the mortgagor's estate, which proved to be insolvent, and a receiver was appointed, who, with the consent of the mortgagees, carried on the business. Arbitrators and an umpire were appointed to fix the compensation money payable by the company. The umpire awarded a sum of £11,950, of which he certified that he had awarded £2,800 in respect of the loss of profits in carrying on the business. The executors claimed the £2,800 as belonging to the mortgagor's estate, to be divided among his general creditors:

Held (affirming the decision of Hall, V.C.), that the £2,800 was in the nature of compensation for the value of the good-will of the business, which passed with the premises; and that the whole of the sum of £11,950 belonged to the mortgagees. *Pile v. Pile*. 778

2. All the bonds issued by corporation, secured by mortgage to be paid *pari passu*. *Matter of Regent's Canal, etc.* 784.

MUTE.

See CRIMINAL LAW, 107, 111 *note*.

N.

NAVIGABLE RIVERS.

1. By the Thames Conservancy Act (20 & 21 Vict. c. cxlvii), s. liii, the Conservators appointed under that act have a power to grant a license to a riparian proprietor to make an embankment in front of his own land abutting on the river, but though such license might be the owner's justification so far as the public right of navigation was concerned, it would not authorize a licensee, being a riparian owner, to embank in front of his own land so as injuriously to affect the land of another riparian owner.
2. The right of navigating a tidal river is common to the subjects of the realm, but it may be connected with a right to the exclusive access to particular land on the bank of the river, and the latter is a private right to the enjoyment of the land, the invasion of which may form the ground for an action for damages, or for an injunction. It comes therefore within the operation of the saving clause (sect. clxxix) of the Thames Conservancy Act.
3. The right of a riparian owner to the use of the stream does not depend on the ownership of the soil of the stream.
4. The power granted to the conservators under the 58d section of the 20 & 21 Vict. c. cxlvii, is qualified and restricted by the provisions of the 179th section. *Lyon v. Fishmongers' Co.* 51, 72 *note*.

NEGLIGENCE.

See ACCIDENT, 190, 200 *note*.
ADMIRALTY, 577.

See CONTRACTOR, 367, 380 *note*.
MASTER AND SERVANT, 420.
RAILWAY COMPANY, 293, 299 *note*.
TELEGRAPH COMPANY, 286.

NON-RESIDENT.

See SECURITY FOR COSTS, 617.

NOVATION.

1. By the deed of settlement of the I. insurance company it was provided that the funds and property of the company should alone be answerable for claims on the company; provision was also made for enabling the proprietors to dissolve the company, and thereupon the directors were to obtain from some other company an undertaking to pay the claims on the I. company, and were to transfer to such other company so much of the assets as should be agreed upon as sufficient to meet such claims. The I. company was accordingly dissolved, and a portion of its funds transferred to the E. company, which covenanted to satisfy the liabilities of the I. company.

C. was a policy-holder of the I. company on the non-participating scale, and as such was not entitled to a vote at the meetings of members. His policy was made subject to the conditions of the deed of settlement. He had notice of the intended amalgamation, but had no formal notice of the completion of the amalgamation, nor was his policy indorsed by the E. company. He, however, paid the premiums and took receipts in the name of the E. company for fifteen years, after which both companies were ordered to be wound up, and came under the European Assurance Society Arbitration Acts:

Held, first, that there was no obligation on the I. company to see that the assets transferred to the E. company were appropriated for the payment of the claims on the I. company; that the amalgamation, being *intra vires*, was binding on the policy-holders, as in *Holt's Case*:

2. Secondly, that even if it had not been binding on the policy-holders generally, C. was bound by his conduct, and had accepted the liability of the E. company. *Cocker's Case*, 757, 765 note.

NUISANCE.

1. The occupier of a house is liable for allowing the continuance on his premises of any artificial work which causes a nuisance to a neighbor, even though it has been put there before he took possession.
2. In a suit by the owner and occupier of a house against the occupier of an adjoining house, complaining of noise from the defendant's stable and of damp from an artificial mound on which it stood :

Held, that the plaintiffs were entitled to an injunction to prevent the defendant from keeping horses in his stable so as to be a nuisance; and that the defendant was also liable for not preventing the damp from going through the plaintiffs' wall. *Broder v. Saillard*, 693, 703 note.

O.

OFFICERS.

See TRESPASS, 356.

P.

PAROL EVIDENCE.

See LOST WILL, 453, 543 note.
 PRINCIPAL AND SURETY, 175, 183 note.

PARTIES.

1. By the Friendly Societies Act (18 & 19 Vict. c. 63), s. 19, the trustees of any society are authorized to bring or defend any action, suit, or prosecution in

law or equity, touching or concerning the property, right, or claim to property of the society.

By s. 7 of 21 & 22 Vict. c. 101, in any proceeding under this act or the above act against a society, it shall be sufficient to make the secretary or other officer of the society, at the time of the plaint or complaint, the defendant.

Proceedings having been taken by a member of a society in a county court to enforce a claim against the society, a compromise was come to between the plaintiff, the solicitor of the member, and the society, by which, *inter alia*, the society promised to pay the plaintiff certain costs and charges. These costs and charges not having been paid, the plaintiff sued the secretary of the society in a superior court :

Held, that this was a proceeding within s. 19 touching the right of the society, and was properly brought against the secretary under s. 7. *Roberts v. Page*, 138, 143 note.

PARTY IN INTEREST.

See BANKRUPTCY, 731.

PATENT.

1. The Crown has the right to the use of a patented process or invention without compensation to the patentee.

Per LORD SELBORNE : This right of the Crown is not because the Crown is impliedly excepted from the effect of the letters patent, but because the privilege thereby granted is granted against the subjects only, and not against the Crown.

2. A patent in the usual terms was granted for an improvement in the manufacture of fire-arms. The Secretary at War issued a notice for a tender for a supply of 13,875 rifles of the description known as that patented. The price was settled, *minus* the cost of the steel barrels and the stocks, which the war office was to supply. The rifles were to be delivered within a certain time, the manufacture of them might be inspected at any time, and they

might be rejected by officers at the war office, if not made according to pattern, or not delivered in time. The persons who took the contract employed the patented process in the formation and insertion of the lock:

Held, that they were liable to the patentee for an infringement of the patent, for that they were not servants or agents of the Crown doing the work of the Crown, but were private contractors with the Crown to supply a certain manufactured article, and were therefore not protected in what they did by any particular privilege attaching to the Crown. *Dixon v. London Small Arms Co.* 24, 50 note.

3. In a suit to restrain the infringement of a patent the defendant was required to state whether he was not making articles in all respects identical with those of the plaintiff, and to set forth in what respects they differed and by what process they were made:

Held, that the defendant, who alleged prior user by himself and others, had sufficiently answered by stating that, save so far as the articles manufactured by him before the date of the patent were similar to those of the plaintiff, the articles he now made differed from those made by the plaintiff, but he could not show in what they differed without ocular demonstration:

4. *Held*, also, that the defendant was bound, in alleging prior user by other persons, to set forth the names of some of those persons. *Crossley v. Tomey.* 618, 625 note.

5. Under an act of Parliament three referees were appointed by the Board of Trade to inspect the gas works of the metropolis, to report upon the impurities in the gas, and to fix a maximum of impurities to be allowed; and the gas companies were bound to give them every facility in the discharge of their duties.

One of the referees took out a patent for improvements in the purification of gas, claiming (*inter alia*) a method of employing lime purifiers, whereby the contents of the purifiers might be converted into sulphide of calcium, for the purpose of purifying the gas from certain compounds of sulphur with which sulphide of calcium combines.

Before the patent was taken out, the

defendant company had been in the habit of using lime purifiers, by which sulphide of calcium had been produced, but they had not succeeded in attaining the desired purity on account of their failing to extract from the gas the whole of the carbonic acid contained in it, which impeded the operation of the sulphide of calcium in the purifiers. The plaintiff's invention mainly consisted in keeping a fresher supply of lime in the first series of purifiers, so as completely to eliminate the carbonic acid from the gas before it was passed on to the subsequent purifiers, in which the sulphide of calcium was produced. The principle of this improvement was indicated in the last report of the referees, but the report was not published till after the date of the patent:

Held (reversing the decision of Bacon, V.C.), that the plaintiff's invention only amounted to an instruction for the more efficient working of a known process, and was not a proper subject for a patent, and the plaintiff's bill was dismissed.

6. Whether it is competent for a member of an official commission to take out a patent for the results of his official investigation, *quære.* *Patterson v. Gaslight, etc.* 733

7. A licensee of a patented invention was ordered to account for all instruments made by him pursuant to the patent. He alleged that the instruments which he had made were not covered by the patent according to its true construction, and in support of his contention tendered in evidence a prior American specification (a copy of which was in the library of the Commissioners of Patents, but was not proved to have been known to the patentee) for the purpose of showing that a construction large enough to cover the instruments made by the licensee would make the patent bad for want of novelty, and therefore ought not to be adopted by the court:

Held, that the evidence was inadmissible. *Adie v. Clark.* 805

PERFORMANCE.

1. The plaintiff agreed in writing with the defendants to sing and play in the

chief female part in a new opera about to be brought out at the defendants' theatre, at a weekly salary of £11 for three months, provided the opera ran for that time, commencing on or about the 14th of November. The first performance was announced for Saturday, the 28th of November, and no objection was raised by plaintiff as to this delay. She attended several rehearsals, such attendance, though not expressed in the written engagement, being an implied part of it. Owing to delays of the composer, the music of the latter part of the opera was not in the hands of defendants till a few days before the 28th of November, and the final rehearsals did not take place till the beginning of the last week. Plaintiff was taken ill, and was unable to attend any of the rehearsals in that week; and, it being uncertain how long her illness might continue, defendants' manager made a provisional engagement with another artiste, Miss L., to study the part and be ready to take it if the plaintiff was unable. If she was not wanted, Miss L. was to receive a deuceur; if she was called on to perform, she was to receive £15 a week till the 25th of December, if the piece ran so long. The plaintiff continued too ill to attend the rehearsals or the first performance on Saturday, the 28th of November, or on the first three days of the next week; Miss L. accordingly performed on those days. On Thursday, the 4th of December, the plaintiff was well enough to perform and tendered her services, which the defendants refused to accept; on which she brought an action for wrongful dismissal. The jury found, *inter alia*, that the employment of Miss L. by the defendants under the circumstances was reasonable:

Held, that the plaintiff's inability to perform on the opening and early performances went to the root of the matter, and justified the defendants in rescinding the contract. *Poussard v. Spiers*. 93, 99 note.

See AGREEMENT, 183.

BUILDING CONTRACT, 403, 416 note.

PERSONAL ESTATE.

See REAL ESTATE, 594, 614 note.

PETITION OF RIGHT.

1. By a treaty between the Queen of England and the Emperor of China, the Emperor agreed to pay to the British government the sum of 3,000,000 dollars on account of debts due to British subjects from certain Chinese merchants, who had become insolvent, being largely indebted to British merchants. The money having been received by the British government:

Held, that a petition of right would not lie by one of the British merchants to obtain payment of a sum of money alleged to be due to him from one of the Chinese merchants.

2. The Statute of Limitations does not apply to a petition of right. *Regina v. Rustomjee*. 143

PLEADING.

See PATENT, 618, 625 note.

POSSESSION.

See CHATTEL MORTGAGE, 434.

POWER.

See APPOINTMENT, 625, 635.

SPECIFIC PERFORMANCES, 625.

PRACTICE.

See MISTAKE, 828, 834 note.

PRESUMPTION.

1. That building where marriage celebrated was licensed. *Regina v. Crosswell*. 106

PRINCIPAL.

See ANNUITY, 814.

PRINCIPAL AND AGENT.

1. The defendant, a broker, signed and sent to the plaintiffs a note of a contract in the following terms: "I have this day sold by your order and for your account to my principals five tons of . . . anthracene . . . W. A. Bowditch." In an action for goods sold and delivered:

Held, reversing the judgment of the Common Pleas Division, that, in the absence of usage making the defendant personally liable, the defendant was not personally liable upon the contract. *Southwell v. Bowditch*. 324, 329 note.

See BROKER, 389.
CONTRACTOR, 367, 380 note.

PRINCIPAL AND SURETY.

1. R. & H., being in partnership, were in the habit, through plaintiffs' firm, of consigning goods to B. & S., in China, for sale; the proceeds were remitted to the plaintiffs in London, against which the plaintiffs accepted bills drawn by R. & H., and which they discounted. If the remittances did not put the plaintiffs in funds when the bills became due, the defendants were bound to make up the deficiency. By long practice, though there was no actual agreement, if the goods were not sold at the maturity of the bills, plaintiffs accepted fresh bills, which the defendants negotiated and handed the proceeds to plaintiffs, who were thereby enabled to take up the first acceptances, and so to let defendants have the benefit of the advance for a further time without being under cash advance. In 1873 the partnership of R. & H. ceased by efflux of time, and it was agreed between them that H. should take over the whole stock, &c., of the old firm. Plaintiffs had notice of this. At the dissolution of the partnership there were acceptances of the plaintiffs running, and, they, after the notice, renewed the bills, according to the old practice, by accepting fresh drafts of H. alone. When the goods were sold, the remittances were not sufficient to meet the plaintiff's advances, and they brought an action against R. & H. to recover the balance.

R. raised as a defence, that he had, by the agreement between him and H., become only a surety for H., instead of a principal joint debtor; and that the plaintiffs, by giving H. time after notice of this, had discharged R.:

Held, that R. & H. could not change their position with regard to the plaintiffs without their assent, and so deprive them of the right they had to treat both R. & H. as principal debtors; that R. was therefore not discharged by the giving time to H. by means of the fresh acceptances.

2. *Semble*, even if the giving fresh acceptances would have otherwise discharged R., that, as it was only a continuance of the old practice to which R. was a party, it would not have discharged him. *Swire v. Redman*. 175, 183 note.

PROBATE.

See WILLS, 450.

PROBATE COURT.

See SURREGATE'S COURT.

PROFITS.

See MORTGAGE, 778.

PROMISE.

See NOVATION, 757, 765 note.

R.

RAILWAY COMPANY.

1. The defendants, a railway company, have a junction at Peterborough, at

which they receive from other lines a great number of trucks, which they, being bound by law to give facilities for through traffic, are compelled to forward with dispatch to their destination. The defendants, when a foreign truck comes on their line, cause it to undergo such a general examination as can take place without causing an undue delay, that is to say, the tires of the wheels are tapped with a hammer, and the truck generally looked over for defects.

A foreign truck, loaded with coal, belonging to the B. Wagon Company, came on to the defendants' line at Peterborough, and there underwent the usual examination, when a defect in one of the springs and a crack in the woodwork was discovered. The truck was shunted, upon the discovery of the defects, in order that it might be repaired by the wagon company to whom it belonged. The defect in the spring, which was the only pressing defect, was repaired, and the truck was handed over to the defendants, and sent on by them to its destination. On the way an accident, by which the plaintiff was injured, happened through the existence of a crack in one of the axles of the truck. It was stated in evidence that by a minute examination of the truck the crack in the axle might have been discovered. The defect in the axle was entirely unconnected with the defects previously discovered. The jury, in answer to questions left them by the judge, found that the crack in the axle might have been discovered by a sufficiently minute examination; but that the defendants were not bound to examine the truck minutely, so as to enable them to see the crack. In answer, however, to a third question left to them, viz., as to whether, although it might not be the defendants' duty on the first view of the truck to examine it minutely, it did not become their duty to do so upon discovery of the defects in the spring and woodwork, the jury answered that it was their duty to require from the wagon company some distinct assurance that the truck had been thoroughly examined and repaired:

Held, reversing the decision of the court below, that on these findings the defendants were entitled to a verdict; for the defendants were not bound to do more in the way of examining the foreign truck on its ar-

rival at Peterborough than they had done, and inasmuch as the defects discovered on such examination were entirely unconnected with the defect that caused the accident, they were not responsible by reason of their failing upon the discovery of such defects to enter upon a more minute examination of the truck, or to make any such inquiry of the wagon company, as suggested by the finding of the jury. *Richardson v. Great Eastern, etc.* 293, 299 note.

See CARRIERS, 156, 174 note; 248, 284 n.

RATIFICATION.

See INFANT, 121, 129 note.

REAL ESTATE.

1. In 1874 the plaintiffs, entered into a contract for the purchase of real estate. After the title had been accepted, and before completion, the vendor died, having by his will (dated in 1873) given his personal estate to E., whom he appointed executor, and devised all his real estate to H. and M. upon trust for sale, and having also devised to H. alone all the real estate which at his death might be vested in him as trustee:

Held, that the real estate contracted to be purchased by the plaintiffs passed to H. under the devise of trust estates. *Lysaght v. Edwards.* 594, 614 note.

RECEIVER.

1. On the application of an unpaid vendor of the property of a company in voluntary liquidation, and unable from insolvency to carry on its works, the vendor was appointed receiver without security or salary. *Boyle v. Bettus, etc.* 718, 720 note.

REMAINDER.

See WILL, 589.

REMAINDERMAN.

See JURISDICTION, 710.
LEGACY, 721, 729.
WILLS, 650.

REMOTE.

1. When gift over is too remote. *Brown's Matter.* 521

RES ADJUDICATA.

See FORMER SUIT, 238, 246 note.

RESCISSION OF CONTRACT.

See PERFORMANCE, 93, 99 note.

RESTRAINT OF ALIENATION.

See ANNUITY, 814.

REVERSIONER.

See JURISDICTION, 710.
WILL, 589.

RIPARIAN PROPRIETORS.

See NAVIGABLE RIVERS, 51, 72 note.

RIVERS.

See NAVIGABLE RIVERS, 51, 72 note.

S.

SALE.

See AGREEMENT, 183.
BILL OF LADING, 349, 355 note.

SALVAGE.

See ADMIRALTY, 559, 570.

SECURITY FOR COSTS.

1. A shareholder of a company who resides out of the jurisdiction and appears to oppose a petition for winding up the company cannot be required to give security for costs. *Matter of Percy and Kelly, etc.* 617

SET-OFF.

1. To an action by an administrator for the balance of the intestate's banking account at the time of his death, the defendants in their statement of defence sought to avail themselves, either by way of set-off or of counter claim, of a debt due to them from the intestate as one of several makers of a promissory note for £1,000, which did not become due until after the intestate's death. Reply, that, before action, an order was made in an administration suit in the Chancery Division, to take an account of the debts and liabilities affecting the personal estate of the deceased, of which the defendants before action had notice; and that, under s. 14 of 23 & 24 Vict. c. 38, equity would restrain any proceedings on the note until the account had been taken. On demurrer to this reply:

Held,—upon the authority of *Rees v. Watts* (11 Ex., 410), that the claim in respect of the promissory note could not be relied on as a set-off; and that, in accordance with the practice in equity, the defendants must under the circumstances be restrained from setting it up by way of counter claim, and be left to prove for it in the administration suit. *Newell v. National, etc.* 381

See INFANT, 121, 129 note.

SETTLEMENT.

1. By a post-nuptial settlement a husband covenanted to settle any property to

which the wife, or he in her right, either then was or at any time during the coverture should become entitled to:

Held, that a contingent interest in a fund standing in court to the credit of a cause, which fell into possession after the termination of the coverture, was bound by the covenant. *Agar v. George*. 706

SINGER.

See PERFORMANCE, 98, 99 *note*.

SOVEREIGN.

See PETITION OF RIGHT, 143.

SOVEREIGNTY.

See PATENT, 24, 50 *note*.

SPECIFIC PERFORMANCE.

1. A trustee having a discretionary trust for sale of real estate under a will at such price as he should think reasonable, with power to postpone the sale, leased the property for thirty years with the concurrence of the beneficiaries. Before the lease expired the property was put up for sale by the lessee and the trustee conjointly, the facts being disclosed by the particulars of sale, and a sale having been effected, the purchase-money was apportioned between the two interests according to the valuation of a skilled valuer:

Held, that the purchaser was not entitled to insist on the concurrence of the beneficiaries on account of the valuation not having been made before the sale, and that the title would be forced upon him. *Morris v. Debenham*. 626

STATUTE.

1. When mandatory and when directory. *Regina v. Church-wardens, etc.* 1, 23 *note*

2. Power given by statute must be exercised in accordance with the authority given, and the restrictions imposed by the act itself. *Regina v. Church-wardens, etc.* 1

STAY.

1. Actions were brought, charging the defendants with conspiring to make, and making, false statements respecting the plaintiff, an officer in the army, to the commander-in-chief, whereby the plaintiff was placed on half-pay. Upon application to stay the actions as frivolous and vexatious, and an abuse of the process of the court, it was stated in the defendants' affidavits that the actions were for acts done by the defendants in the due course of their duty as members of a military court of inquiry, and this was not denied by the plaintiff:

Held, that the actions ought to be stayed, on the ground that *Dawkins v. Lord Rokeby* (14 Eng. R., 127; Law Rep., 7 H. L., 744), was a case directly in point that an action under such circumstances would not lie. *Dawkins v. Prince, etc.* 144, 148 *note*

STIPULATION.

See MISTAKE, 828, 834 *note*.

STOCKHOLDERS.

1. The owner of sixty £100 shares in a company, on each of which £10 had been paid up, sold them on the Stock Exchange to jobbers, who furnished the name of a purchaser to whom the shares were transferred, and in whose name they were registered. The company was afterwards ordered to be wound up, when it turned out that the purchaser was an infant at the time of the transfer; and his name was thereupon removed from the list of contributors, and that of the vendor placed thereon. The vendor then filed his bill against the jobbers to compel them to indemnify him against all liability in

respect of the shares, and to repay him all calls he might have to pay thereon, with costs. After the defendants had put in their answer, an agreement was entered into between the plaintiff and the liquidator for a compromise of the plaintiff's liability on the shares (amounting to £5,400), the terms of which were, in substance, that the plaintiff should pay the liquidator £2,000, transfer the shares to him, and authorize him to use his name in all proceedings against the defendants, and to retain all moneys recovered therein, which were to be applied in recouping the plaintiff the £2,000, and in satisfying all liability on the shares, in consideration whereof the plaintiff was, after all proceedings were over, to be released from all liability on the shares without further payment. Upon the hearing of the cause (*Nickalls v. Merry* having meanwhile been decided in the House of Lords), the defendants did not dispute their liability to the plaintiff as vendor of the shares, but they contended that the release comprised in the agreement enured for their benefit, so as to make the £2,000 payable thereunder by the plaintiff the measure of their own liability either to the plaintiff or to the liquidator:

Held, that, the object and spirit of the agreement being to keep up and enforce the liability of the defendants, they could not set it up without giving effect to all its provisions, and consequently that it did not operate as a release in their favor, or relieve them in any degree from their liability to pay the full amount payable on the shares. *Heritage v. Paine.* 681

2. A shareholder in a company filed a bill to have his contract to take shares declared void on the ground of deception and misrepresentation of the company by reason of their having commenced their railway when only one-fifth of the share capital was subscribed, and having entered into a contract for the construction of a part only of the proposed line, with insufficient capital:

Held, by Malins, V.C., that the grounds alleged by the plaintiff would have been sufficient to sustain his bill, but that he had disentitled himself to relief by reason of various acts of acquiescence when he knew the financial position of the company, and by reason of delay in filing the bill:

3. *Held*, on appeal (without giving any opinion as to the plaintiff's original title to relief), that his bill must be dismissed on the ground of his having continued to act as a shareholder for some months after he became aware of the circumstances on which he founded his case. *Sharpley v. Louth.* 672

See CORPORATIONS, 644, 649 note.

SUBJECT.

See PETITION OF RIGHT, 143.

SUPPORT.

See MINES, 88, 92 note.

SURROGATE'S COURT.

1. When Chancery cannot entertain suit to set aside a will as fraudulently procured. *Meluish v. Milton.* 771, 778 note.

T.

TAIL, ESTATE.

See WILL, 589.

TELEGRAPH COMPANY.

1. The defendant's business was to collect telegraphic messages for transmission to America and other places. The plaintiffs intrusted the defendant with a message in cipher, which was unintelligible to the defendant, for transmission to America. The defendant negligently omitted to send the message. The consequence was that the plaintiffs lost a sum of money which they would

have earned for commission upon an order to which the message related :

Held, that the plaintiffs could not recover such sum of money from the defendant, but only nominal damages.
Sanders v. Stuart. 288

TRESPASS.

1. By s. 12 of the Merchant Shipping Act, 1878 (36 & 37 Vict. c. 85), it is enacted that, where the Board of Trade have received a complaint or have reason to believe that any British ship is by reason of the defective condition of her hull, &c., or by reason of overloading, &c., *unfit to proceed to sea without serious danger to human life*, they may appoint some competent person or persons to survey her and to report to them, and may if they think fit, order her to be detained for survey; and thereupon any officer of customs may detain such ship until her release be ordered either by the board or by any court to which an appeal is given under s. 14 of the act; and, upon receipt of the report of the surveyor, the board may, if in their opinion the ship cannot proceed to sea without serious danger to human life, make such further order as they may think requisite as to the detention of the ship, or as to her release either absolutely or upon the performance of such conditions with respect to repairs, &c., as the board may impose :

Held, that neither the original information or complaint nor the report of the surveyor need state in terms that the vessel "cannot proceed to sea without serious danger to human life": it is enough if the facts reported to the board are such as ought reasonably to satisfy them that the condition of the ship is such that she is unfit to proceed to sea without serious danger to human life.

2. The chief officer of customs at Hull, on the 6th of November, 1873, intimated to the Board of Trade that he had examined a ship called the *Mary Ann* (built in 1831), and was of opinion that she should be examined with the cargo out but before being allowed to proceed to sea. The defendant (the assistant-

secretary of the Board of Trade) on the 7th wrote to the collector of customs at Hull, as follows: "The Board of Trade having reason to believe that the vessel named above is unseaworthy, you are requested to detain her for the purpose of survey;" and on the same day he wrote to the owner of the *Mary Ann*, as follows,—“I am directed by the Board of Trade to inform you that they have reason to believe that the British ship *Mary Ann* is for the reasons stated unfit to proceed to sea without serious danger to human life. The Board of Trade have therefore ordered her detention by the proper authority until she can be surveyed.”

The ship was surveyed on the 12th of November by two surveyors of customs, who reported to the board that "they had examined the vessel, and found that a thorough repair would be required to render her seaworthy, that the decks were quite worn out, the deck-beams and knees were defective, and the timbers rotten," and intimated that, as the vessel belonged to Sunderland, the owner wished to take her there for repair. This report was sent to the owner of the *Mary Ann* on the 15th of November, inclosed in a letter, in which the assistant-secretary of the board wrote, in answer to a request of the owner to be allowed to take the vessel to Sunderland in ballast,—“I am directed by the board to state that they are prepared to allow the *Mary Ann* to be towed round to Sunderland for the necessary repairs, provided the crew, knowing the case, are willing to go in her. Upon hearing that the repairs indicated in the accompanying report have been effectually and completely carried out, they will direct a re-survey of the vessel to be made," &c. On the 1st of January, 1874, the board communicated to the plaintiff's solicitors by telegram and letter their consent to the vessel *sailing* to Sunderland upon certain conditions. Those gentlemen in reply objected to the right of the board to make the conditions indicated, "inasmuch as your surveyors did not report that the ship was 'unfit to proceed to sea;' neither has the Board of Trade, so far as we know, made any order stating that in their opinion the ship is unfit to proceed to sea."

In reply to this letter, the assistant-secretary of the board wrote to the so-

licitors on the 7th of January, 1874, a statement of the facts relating to the detention of the *Mary Ann*, concluding as follows,—“The Board of Trade now withdraw the modification of their order by which she would have been allowed to proceed to Sunderland; and, under the powers given to them by the act, they vary their order as follows, viz., that, as in their opinion the ship cannot proceed to sea without serious danger to human life, she shall be detained at Hull for further survey and repairs.”

The ship was accordingly surveyed on the 14th of January, the surveyors reporting that every portion of the hull was in a state of extreme decay; concluding their report as follows,—“From what we have seen and tested, we are of opinion that at the time of survey the ship was, having regard to the nature of the service for which she was intended, unfit to proceed to sea without serious danger to human life.” A copy of this report was sent to the plaintiff's solicitors on the 16th of January, in a letter in which the assistant-secretary wrote,—“I am to state that the order made by the board thereupon is, that the vessel be detained at Hull until repaired to the satisfaction of this board's surveyor.” Ultimately, the ship was taken possession of by a mortgagee, and sold for a small sum.

In an action brought by arrangement against the assistant-secretary of the Board of Trade for the alleged illegal detention of the ship:

Held, that the detention was justifiable, the board having ample grounds for believing that the ship could not proceed to sea without serious danger to human life; that the letter of the 7th of November, 1873, did not amount to an order under s. 12 of the act; but that the letter of the 7th of January, 1874, was a valid order which could be questioned only upon appeal under s. 14 of the act.

3. Sect. 14 of the act provides that, if the owner of any ship surveyed under this act is dissatisfied with any order of the board made upon such survey, he may apply (in England) to any court having Admiralty jurisdiction; and such court may order the ship to be surveyed anew, and may make such
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order as to the detention or release of the ship, and as to costs and damages, as to the court may seem just:

4. *Quære*, whether, in the case of any excess of jurisdiction on the part of the board, the plaintiff's common law remedy by action was taken away by this enactment? *Lewis v. Gray*. 356

TRUST.

See APPOINTMENT, 821.

U.

ULTRA VIRES.

1. The directors of a company were empowered to issue 100 mortgage debentures at £95 for £100. Sixty of these debentures were duly taken up; the other forty were afterwards mortgaged by the directors by way of collateral security for an advance of money. The company was afterwards wound up:

Held (affirming the decision of Malins, V.C.), that the mortgage was not *ultra vires*, and that the mortgagees would receive dividends on the whole amount expressed to be secured by their debentures, *pari passu* with the holders of the other sixty debentures. *Matter of Regent's Canal, etc.* 784

V.

VENDOR AND VENDEE.

See AGREEMENT, 133.

BILL OF LADING, 349, 355 *note*.

CROPS, 301, 308 *note*.

REAL ESTATE, 594, 614 *note*.

VESTED LEGACY.

See LEGACY, 721, 729.

W.

WATER AND WATERCOURSES.

See NAVIGABLE RIVERS, 51, 72 note.

WILLS.

1. An American, by a will and codicils, disposed of his property generally, and by a second will, in which he named separate executors, of moneys he had invested in the British funds. He expressed a distinct wish that the British will should take effect as a separate, testamentary disposition of property independent of and disconnected from his general will:

Held, that it was unnecessary to incorporate the American will, which was very bulky, in the English probate, but that an authenticated copy of the American will and codicils should be filed in the registry, and a note be added to the English probate to the effect that such copy had been so filed.
Matter of Astor. 450

2. The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence.
3. Declarations, written or oral, made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents (Mellish, L.J., dissenting as to declarations made after the execution of the will).
4. The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached.
5. When the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved.
6. When a cause in the Probate Division has been heard before a judge without a jury, the evidence being given *viva voce*, the parties may, if they please, apply for a rehearing under Rule 60 of the Probate Court Orders of July, 1862, or they may, without doing so, appeal

from the decision of the judge, on the facts as well as the law, to the Court of Appeal. *Sugden v. St. Leonards*, 453, 543 note.

7. Testator gave his real and personal estate to a trustee upon trust to pay the proceeds to his wife for the maintenance and education of his children until the eldest should attain twenty-five, or until his wife should marry again; and, in case of her second marriage before any of his children should attain twenty-five, to pay her £30 a year, and apply the residue towards the maintenance and education of his children; and when his two sons should attain twenty-five, then to raise certain sums for them, and pay the proceeds of the residue to his wife if she should be then unmarried, but in case she should marry again, then, after providing an annuity for her for her separate use, to pay the residue equally between the testator's children and their issue and their heirs as tenants in common; and in case both his children should die under twenty-five without leaving issue, then to give the proceeds to his wife for life; and after her death the said property to be in trust as to one moiety for the wife, and as to the other for the trustee absolutely.

The wife survived the testator and died without having married again, leaving the testator's only two sons surviving, who had since attained twenty-five, but who had no issue:

Held, that the gift over of the real estate on the second marriage of the wife took effect on her death:

8. *Held*, also, that the sons took equitable estates tail according to the rule in *Wild's Case*. *Underhill v. Roden*. 589
9. A testatrix gave several life annuities and directed funds to be invested, producing an income sufficient to meet them. She bequeathed the residue of her estate, "including the fund set apart to answer the said annuities when and so soon as such annuities shall respectively cease," to J. B. T. The estate was only sufficient to pay about 5s. in the pound on the legacies and the values of the life annuities, and under an order of the court the sums apportioned to the values of the life annuities were invested, and the dividends paid to the annuitants. On the death

of one of the annuitants, J. B. T. applied for payment to him of the fund of which that annuitant had been receiving the income:

Held, by Bacon, V.C., that J. B. T. was entitled:

10. *Held*, on appeal, that J. B. T. had only the ordinary rights of a residuary legatee, and could take nothing until the legacies and annuities had all been paid in full, and that his application must be dismissed. *Hankin v. Kilburn*. 650

11. A testator made a will giving all his property to his wife, and appointing her sole executrix. She proved the will. The heir-at-law and sole next of kin filed a bill to have her declared a trustee of the property for him, on the ground that she had fraudulently concealed from the testator the fact that

she was not his lawful wife, as she had a former husband living:

12. *Held*, that the Court of Chancery had no jurisdiction to entertain the case, which was within the exclusive jurisdiction of the Court of Probate; and that the case was not distinguished from *Allen v. M'Pherson* by the fact that the lady had not asked the testator to make a will in her favor. *Meluish v. Milton*. 771, 778 note.

See APPOINTMENT, 821, 835.

LEGACY, 721, 729.

REAL ESTATE, 594, 614 note.

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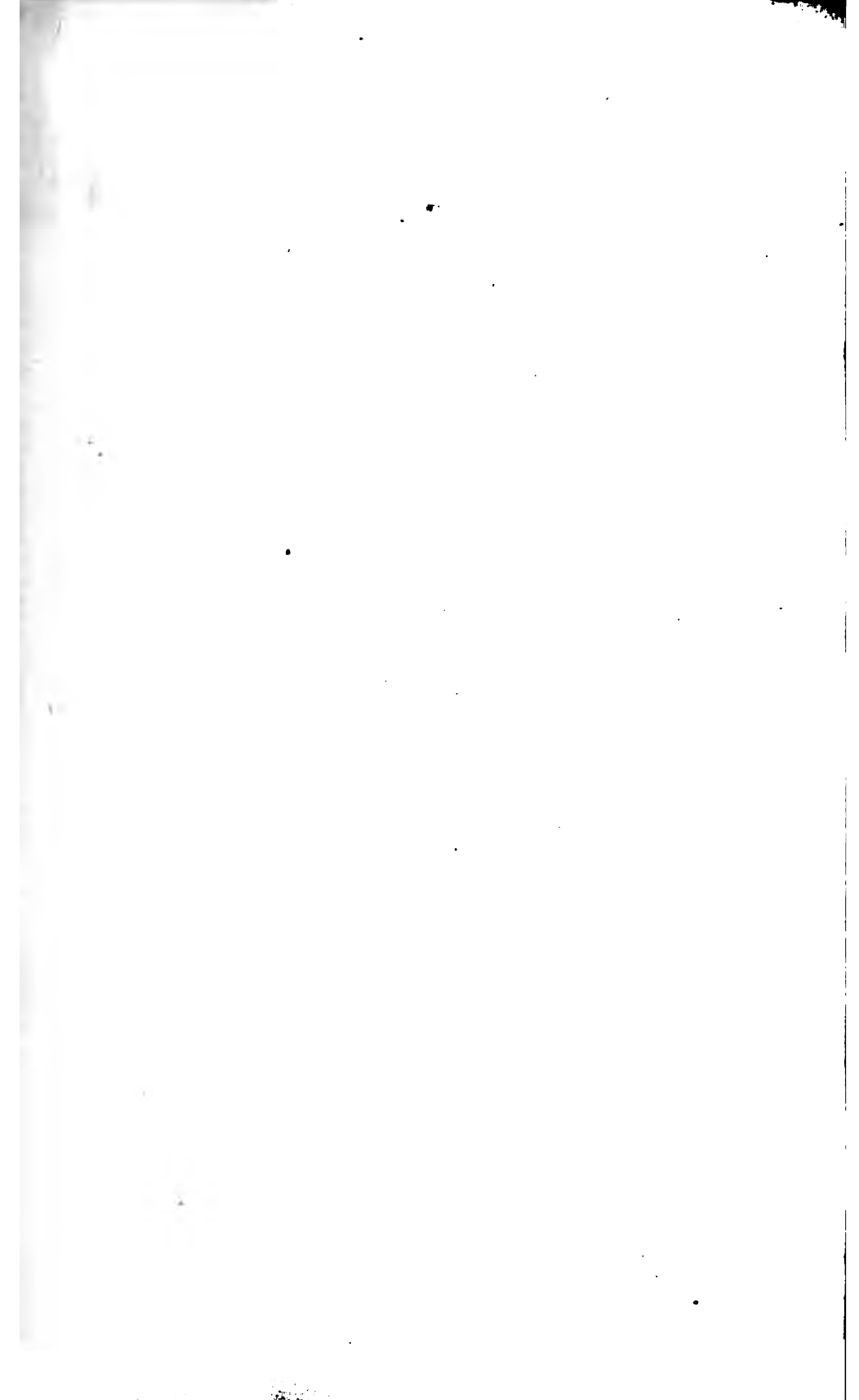
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